Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-826

ILLINOIS TERMINAL RAILROAD COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented for Review	3
Statement of the Case	4
Statutes and Regulations Involved	7
Argument	13
I. An Important Federal Question Is Presented Which Has Not Been But Should Be Settled by This Court	13
II. The Court of Appeals Has Decided This Federal Question as to the Power of the ICC in Such a Way as to Conflict With an Applicable Decision of This Court	18
Conclusion	21
Appendix A	A-1
Appendix AA	A-13
Appendix B	A-14
Appendix C	A-50
Appendix D	A-52
Appendix E	A-54
Appendix F	A-57

Table of Cases Cited

Chesapeake & Ohio Ry. Co. v. United States, 392 F. Supp. 358 (D.C. Va. 1975)	18

Interstate Commerce Commission v. United States ex rel. Los Angeles, 280 U.S. 52, 74 L.Ed. 163, 50 S.Ct. 53 (1929) 18, 19

United States v. Chesapeake & Ohio Ry., ... U.S. ..., 44 U.S.L.W. 4869, 49 L.Ed. 2d 14 (1976) .. 13, 14, 16, 18

United States v. Pennsylvania R. R. Co., 242 U.S. 208 (1916) 2, 18, 19, 20, 21

Statutes and Regulations Cited

28 U.S.C. § 1242(1) 3

28 U.S.C. § 2101(c) 3

28 U.S.C. § 2321(a) 3

28 U.S.C. § 2342(5) 3

28 U.S.C. § 2350 3

49 U.S.C. § 1(10) 8

49 U.S.C. § 1(11) 9, 20

49 U.S.C. § 1(14)(a) 4, 7, 15, 19

49 C.F.R. § 1036.3 ..... 4, 5, 6, 9

49 C.F.R. § 1036.4 ..... 4, 5, 9

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To the United States Court of Appeals for the Eighth Circuit

Illinois Terminal Railroad Company petitions this Court to grant it a writ of certiorari to review a judgment and decision of the United States Court of Appeals for the Eighth Circuit entered in a proceeding before said Court which was filed to obtain a review of an order of the Interstate Commerce Commission (hereinafter usually referred to as ICC or the Commission) on the grounds that:

(1) Said decision involves a question of exceptional importance which has not been but should be settled by this Court

because: (a) it erroneously interprets the Interstate Commerce Act (hereinafter sometimes referred to as the Act) so as to give power and authority to the ICC which was not granted by the Act, and (b) the exercise of such power by the ICC will have a major and adverse effect upon the management and financial affairs of all of the railroads in the United States which are subject to regulation by the ICC.

(2) Although this Court has not passed upon the particular question presented here, the Court of Appeals has decided the issue in such a way as to conflict with the decision of this Court in the case of *United States v. Pennsylvania R. R. Co.*, 242 U.S. 208 (1916).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in Illinois Terminal Railroad Company, a Corporation v. United States of America and Interstate Commerce Commission, No. 75-1497, appears at 541 F.2d 201. A true copy of that opinion is appended hereto as Appendix A. The Court's order denying petition for rehearing is Appendix AA.

Pertinent decisions of the ICC in its proceeding Ex Parte No. 252 (Sub—No. 1) Incentive Per Diem Charges—1968 are also appended as follows: Appendix B is the Commission's decision of April 28, 1970 in which it initially promulgated its regulations governing incentive per diem charges. It is portions of said regulations (later amended) which petitioner contends exceed the authority of the ICC. Appendix C and D set out rulings of the Commission's Bureau of Accounts directed to petitioner interpreting the incentive per diem regulations, and Appendix E is the order of the Commission in Ex Parte No. 252 (Sub—No. 1) Incentive Per Diem Charges—1968 upholding the said rulings of its Bureau of Accounts.

Appendix F is the Commission's decision of March 31, 1975 amending the portions of the incentive per diem regulation which petitioner contends are beyond the authority of the Commission.

JURISDICTION

Illinois Terminal Railroad Company petitioned the United States Court of Appeals for the Eighth Circuit on July 10, 1975 to review an order of the ICC which the Commission entered in an on-going rule-making proceeding known as Ex Parte No. 252 (Sub—No. 1) Incentive Per Diem Charges—1968.

Said Court of Appeals had jurisdiction for such review under the provisions of 28 U.S.C. §2321(a) and §2342(5).

The Court of Appeals filed its judgment and decision which affirmed the order of the ICC on September 2, 1976. Thereafter, Illinois Terminal petitioned for rehearing and suggested such rehearing be granted by the Court of Appeals in Banc. The Court of Appeals denied such petition for rehearing and for rehearing in Banc on September 24, 1976. This petition for certiorari is being filed within ninety (90) days of the entry of the decision of the said Court of Appeals as is required by 28 U.S.C. §2101(c).

The jurisdiction of this Court to review the judgment and decision of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §2350 and 28 U.S.C. §1242(1).

QUESTIONS PRESENTED FOR REVIEW

Although many orders have been made and are still being made by the ICC in its proceeding Ex Parte No. 252 (Sub—No. 1) Incentive Per Diem Charges—1968, the major regula-

tions resulting from said proceeding are found in Part 1036 of Title 49 Code of Federal Regulations, which regulations authorize and regulate and control the imposition and disposition of what are known as incentive per diem charges for the use of certain types of railroad freight cars (hereinafter incentive per diem will usually be abbreviated as IPD).

Petitioner presented to the Court of Appeals and presents to this Court the question as to whether or not those portions of the said regulation of the ICC, 49 C.F.R. § 1036.3 and § 1036.4, which require the earmarking of funds received by railroads as incentive compensation for use of general service boxcars and which condition and restrict the expenditure of such incentive funds, are in excess of the power and authority granted to the Commission under the Interstate Commerce Act.

STATEMENT OF THE CASE

In 1966, The Congress of the United States in an effort to alleviate shortages of railroad freight cars amended Section 1(14)(a) of the Interstate Commerce Act to grant to the ICC authority to increase the compensation to freight car owners by such an incentive element or elements as would in the Commission's judgment provide just compensation to the car owners, contribute to sound car service practices, and encourage the acquisition and maintenance of an adequate car supply. The Commission was not to make an incentive element applicable to any type of car which it determined to be in adequate supply. P.L. 89-430, 80 Stat. 168, amending Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a).

A proceeding (Ex Parte No. 252 [Sub—No. 1] Incentive Per Diem Charges—1968) initiated by the Commission thereafter established that general service boxcars were in short supply and the Commission by its order (Appendix B) of April 28,

1970, initially promulgated regulations to establish incentive charges to be paid by user carriers to owner carriers for use of such general service boxcars and required in such regulation (Part 1036 of Title 49, Code of Federal Regulations) that carriers which accumulated net credit balances of such incentive funds must segregate such funds in special accounts to be "earmarked" for use for the purchase, building and rebuilding[1] of general service unequipped boxcars under the following rigid requirements:

Such funds may not be expended for boxcars until the carrier holding such funds has for each calendar year purchased, built, rebuilt or leased with its general funds the average number of boxcars which it had purchased, built, rebuilt or leased during a five year base or test period (1964-1968). Such acquisitions must be completed within a ten month period. Unexpended funds must be put at interest and the interest credited to the earmarked fund.

In an order in the same proceeding (Appendix F) promulgated March 31, 1975 and finally made effective October 1, 1975, the Commission further restricted the use of IPD funds. It provided that such funds must be put to use within eighteen months after the end of the calendar year in which collected. If not so used, the funds "may be voluntarily surrendered" to Rail Box, a national freight car pool company. If the carrier fails to use or surrender the funds in accordance with the regulations, the Commission will investigate to determine what corrective action is warranted.

The regulations provide for earmarking only of net balances after income taxes.

Petitioner is a common carrier by railroad engaged in transportation in interstate commerce, is subject to regulation by the

[1] The regulation was later amended to include leasing.

ICC, and is a party to the IPD proceeding. Petitioner is the owner of considerable numbers of general service boxcars and after the IPD program was initiated became an IPD creditor. IPD revenue was a substantial part of petitioner's net income for the years, 1970, 1971, 1972, and 1973.

Petitioner was caused to complain of the Commission's orders in regard to IPD funds when the Commission's Bureau of Accounts refused to allow petitioner to deduct from earmarked IPD funds a sum which represented income taxes which would properly have been charged against IPD funds if petitioner had not had available net operating loss carryovers from prior years. (See Appendices C and D.)

On December 18, 1974, petitioner filed in the IPD proceeding a petition for modification of the ruling by the Bureau of Accounts as to treatment of said deduction, or in the alternative to amend the regulation of the Commission, § 1036.3, which the said ruling of the Bureau of Accounts had interpreted.

Petitioner's said petition was referred to Division 2 of the ICC and was considered by said Division on the record in the IPD proceeding and on the 10th day of February, 1975 an order was entered denying the petition (Appendix E). Petitioner filed a motion for reconsideration and on May 13, 1975, the ICC denied the motion for reconsideration.

Petitioner thereafter sought review of the Commission's order in the United States Court of Appeals for the Eighth Circuit.

Although petitioner originally complained only of the ICC's requirement that it reimburse earmarked IPD funds by restoring moneys which it had deducted therefrom on account of the use of its net operating loss carryovers as an offset for tax purposes against IPD income, in the Court of Appeals petitioner challenged as beyond the Commission's statutory authority the earmarking requirement with all the related conditions placed by the Commission upon the handling and expenditure of the IPD funds.

The Court of Appeals considered the question of the statutory authority of the Commission to order earmarking and held the earmarking requirement to be a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to authorize IPD rates. The Court then went on to uphold the Commission's ruling as to the moneys petitioner had deducted from its earmarked funds. Petitioner does not attempt to bring before this Court the subsidiary question as to its net operating loss carryover.

Illinois Terminal petitions this Court to grant a writ of certiorari to determine whether or not the Court of Appeals ruled correctly upon the important question of federal law as to the power of the Commission to order earmarking of the incentive funds.

STATUTES AND REGULATIONS INVOLVED

Statutes:

Interstate Commerce Act:

49 U.S.C. § 1(14)(a):

Section 1(14)(a). The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any

locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

Vol. 10, United States Code (1970 ed.), pp. 11868-9[2]

49 U.S.C. § 1(10):

§ 1(10). The term "car service" in this chapter shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles

[2] This section of the Act was amended while the petition for review was pending in the Court of Appeals but not in a manner which would add to the Commission's power. For the amended version, see footnote 3 of the opinion of the Court of Appeals, Appendix A, p. A-6.

used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter.

Vol. 10, United States Code (1970 ed.), p. 11868

49 U.S.C. § 1(11):

§ 1(11). It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

Vol. 10, United States Code (1970 ed.), p. 11868

Regulations:

Interstate Commerce Commission Regulations:

Section 1036.3:

Each common carrier by railroad shall segregate in Account 716, Capital and Other Reserve Funds, and shall transfer from Account 798, Retain Income, Unappropriated to Account 797, Retained Income, Appropriated, an amount equal to the net credit balance resulting from any incentive per diem settlement involving boxcars subject to this part. The carrier shall maintain a separate bank account for the segregated funds. Canadian carriers shall transfer a net balance after taxes to a U.S. designee, which may be either a United States class I railroad or a United States corporation established solely to purchase, hold title to, and control general service, unequipped boxcars subject to the Department of Transportation's safety regulations and the Inter-

state Commerce Commission's rules pertaining to per diem and car service, and to any reporting requirements determined to be applicable by the Commission's Bureau of Accounts. If the designee of Canadian carriers is a United States railroad, it shall maintain a separate account for funds received on Canadian-owned boxcars. All boxcars purchased or built by such designee or such other corporation with incentive per diem funds earned on Canadian boxcars must be built in the United States. Any United States taxes incurred after transfer of a net balance to such designee may be deducted from the transferred amount for the purpose of determining a final net balance for investment. The earmarked funds shall be reduced by the amount of the additional income tax paid as the result of increasing taxable income by inclusion of net incentive per diem earnings. The funds in such account shall be used to purchase, lease, or build new, unequipped boxcars for general service or to rebuild general service, unequipped boxcars with code numbers and mechanical designations set forth in § 1036.1 for addition to such carrier's or designee's fleet in accordance with this part. The unexpended funds remaining in the accounts of the carriers may be invested in Government bonds or other interest-bearing, temporary securities. The interest earned thereafter shall become part of the earmarked fund.

49 C.F.R. § 1036.3 (Oct. 1, 1975)

Section 1036.4:

The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with § 1036.3, may be drawn down in whole or in part at any time by the carrier to build, lease equivalent of purchase, or purchase, in whole or in part, new unequipped boxcars for general service described in § 1036.1, *provided*, the carrier has in the same calendar year built, leased, or purchased its 1964-68 average acquisitions of such boxcars and made up an arrearage in having

failed to maintain such average each year this order is in effect. Earmarked funds may also be used in whole or in part to lease any number of new unequipped boxcars for general service described in § 1036.1, in which the carrier is not acquiring an equity interest, *provided*, the carrier has in the same calendar year leased its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year the order is in effect. Nonequity leases must be at least 10 years in duration, and, in connection with such leases, earmarked funds must not be used for the cost of maintenance. Earmarked funds may be used in whole or in part to rebuild any number or portion of general service, unequipped boxcars described in § 1036.1, *provided*, the carrier has in the same calendar year rebuilt its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year the order is in effect. Net balances on Canadian-owned cars may be drawn down without regard to prior acquisitions, but where the designee is a class I United States carrier such drawdowns shall not affect that carrier's accumulation of arrearages resulting from prior failure to build, rebuild, lease, or purchase its 1964-68 arrearages. However, upon application, including a showing that all parties to the proceeding herein have been notified by the carrier of such application and a showing of good cause why any carrier is unable to draw down in whole or in part the net credit balance resulting from incentive per diem settlements because it cannot comply with the above test period average requirements of having in the same calendar year built, rebuilt, leased or purchased its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect, the Commission may, in its discretion, after consideration of all views regarding the application, modify the test period average to the extent consistent with the public interest and the national transportation policy. Such modification, as a minimum, shall require that a carrier match the earmarked funds it will use with an equal amount of its own funds. Earmarked funds must be

put to use within 18 months after the end of the calendar year in which the funds are collected and result in a net credit balance for the building, rebuilding, leasing, or purchasing of general service, unequipped boxcars described in § 1036.1 for addition to such carrier's or designee's fleet in accordance with this part. Upon a showing of good cause an application, including a showing that the parties to the proceeding herein have been notified by the carrier of such application, may be made to the Commission for waiver of the said 18-month period, which may, in the Commission's discretion, be granted after consideration of all views regarding the application. If the earmarked funds are not used within the 18-month period, they may be voluntarily surrendered to Rail Box whose establishment and operation was approved in Finance Docket No. 27589, *American Rail Box Car Company and Trailer Train Company, et al.—For Approval of the Pooling of Car Service with Respect to Box Cars.* If the carrier fails within the stated period to put to use collected earmarked funds which result in a net credit balance, has not obatined relief from that requirement, and has not surrendered such funds to Rail Box, the Commission will investigate the matter to determine what, if any, corrective action is warranted. Appropriate corrective action would include section 16(12) remedies among others. Carriers may make temporary investments of unexpended funds in Government bonds or other liquid securities. Such securities must be readily convertible to cash so that funds remain available for boxcar purchases. Interest earned must become part of the earmarked fund. As used in this section, "build," "rebuild," "lease," or "purchase" refer to a commitment to build, rebuild, lease, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment, except that in extraordinary cases beyond the control of the carrier or the car supplier, a car that is delivered after 10 months from the date of commitment may qualify if approved by the Bureau of Accounts of this Commission.

49 C.F.R. § 1036.4 (Oct. 1, 1975)

ARGUMENT

I

An Important Federal Question Is Presented Which Has Not Been But Should Be Settled by This Court.

Broadened somewhat, the question here is whether or not the ICC has power to tell the railroads subject to its regulation how to spend their money.

Over the many years of the existence of the ICC, the federal courts have held that the Commission has no such power and the Congress has not seen fit to make up such deficiency.

Recently in *United States v. Chesapeake & Ohio Ry.*, . . . U.S. . . ., 44 U.S.L.W. 4869, 49 L.Ed 2d 14 (1976) (hereinafter referred to as the *Chessie* case), this Court, passing, as it carefully stated, upon a narrow question held that the Commission could as a condition for not suspending a proposed increased freight tariff, require the railroads to devote the additional revenues from such increase to capital improvements, which the railroads had asserted were the need requiring the increase. To this limited extent and for the first time, it was thus judicially determined that the Commission could exercise some control over expenditures of their funds by railroads. In the order in question in the *Chessie* case, the Commission had made no attempt to direct the railroads as to the specific type or types of improvements to make with their additional revenue. The decisions on this subject were to be left to the managements of the railroads. This Court, again making clear that its holding was of limited scope, said:

> "We do not imply that the Commission may involve itself in the financial management of the carriers. . . . 49 L.Ed.2d at p. 24."

Using the *Chessie* opinion as a springboard and disregarding the cautions of this Court that it was therein passing upon a narrow question, the Court of Appeals has made a long leap and, without finding authorization in the Interstate Commerce Act and with very little analysis, other than loose analogy to the *Chessie* case, has found the Commission empowered to place numerous conditions and restrictions upon the handling of IPD funds and thus to involve itself in the minutest details of the management of these moneys.

The question as to whether the Commission has such power to tell the railroads how to spend the IPD moneys, how much from their general funds they must spend before they spend the IPD funds, when they must spend the IPD funds, and that they must "voluntarily" give them up if they fail to comply with the Commission's directions, has not been passed upon by this Court. The question assuredly was not comprised in the narrow issue presented by *Chessie*.

The question is an important one, not just because the particular issue concerning Commission control of the IPD funds is important, which indeed it is as millions upon millions of dollars of railroad revenues are thus subjected to Commission control, but it is of even greater importance in that the Court of Appeals decision seems to open the door (which this Court carefully left closed) to a more general involvement by the Commission in the financial management of carriers. In particular, as appears in the second point of this argument, the opinion of the Court of Appeals can be read to suggest that the Commission has authority to direct railroads to buy freight cars without regard to the source of the funds to be used for such purpose.

Furthermore, the question is important because it involves the interpretation of a congressional enactment in a way that the language of the statute and its legislative history make clear is entirely contrary to the congressional intention.

It would appear that, regardless of the subject matter, a judicial interpretation of federal statute law in a manner clearly not in accord with legislative intent, presents an important federal question for resolution by this Court. The importance is greatly magnified when the subject matter is the power of the ICC over the financial affairs of the major railroads in the country.

The petitioner presented to the Court of Appeals as a part of its Brief below extensive excerpts from the Congressional Record showing the stated purposes and intentions of members of Congress in amending the Interstate Commerce Act, Sec. 1(14)(a) in 1966 so as to authorize the ICC to increase compensation by an incentive element for types of freight cars determined by the Commission to be in short supply.[3] The history makes it crystal clear that the Congress had the intention of bringing the profit motive into play by providing an *economic incentive* to railroads to invest in cars and that there was no thought in the minds of the proponents and sponsors of this legislation of authorizing the Commission to compel or coerce the expenditure of the additional revenue for freight cars. The very language of the amendment negatives any intention that there should be coercion. There would have been no reason to call the additional compensation "incentive ele-

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[3] Petitioner deems it inappropriate to burden this Court on petition for certiorari with this material, although it is striking in that speaker after speaker talked of economic or financial incentive or of the profit motive or of making the ownership of freight cars more attractive.

Nothing in the way of congressional history was presented to the Court of Appeals which tended in the slightest to show that the proponents of the incentive per diem legislation had any intention of authorizing the Commission to direct railroads as to the manner of handling or expending the additional moneys which were to come from car ownership.

The Court of Appeals relied upon some of the history of amendments to the Act made in 1920, disregarding the recent and more directly pertinent congressional statements.

ments" if the intention had been to authorize the Commission to impress such funds with a trust to be spent for freight cars only, nor would there have been any reason to prescribe that the incentive rate should be such as would "encourage the acquisition and maintenance" of an adequate car supply if the Congress had meant to allow the Commission to command the acquisition of cars.

The Court of Appeals entirely disregarded the pertinent legislative history of the 1966 amendment and entirely disregarded the pertinent language of the amendment. Instead, as pointed out above, it relied primarily upon the *Chessie* opinion which, in view of the limited question adjudicated there, was not a precedent, and looked at other portions of the Interstate Commerce Act in order to find a power in the Commission which a closer scrutiny of the legislation the Court was supposedly interpreting would surely have revealed did not exist.

The Court of Appeals did not comment upon the significance of the use of the word "incentive" to describe the additional charge, nor did it consider why the Commission was to establish a rate which would "encourage" the acquisition and maintenance of an adequate car supply if the Commission was authorized to direct that the additional revenues be spent only for cars.

Neither did the Court of Appeals give any consideration to the question as to whether or not moneys so hedged with conditions and restrictions could reasonably be deemed to be "compensation" within the meaning of the amendment.

Nor did the Court consider the congressional intent to encourage those railroads without adequate numbers of cars to purchase them, rather than to force those railroads which were well-supplied and who would initially benefit from IPD charges to buy more and more cars with their IPD revenues.

Further, the Court of Appeals did not consider the circumstance that to approve the Commission's earmarking order is to approve an order which compels *all* incentive income to be spent for the *acquisition* of cars and, therefore, ignores and defeats what appears to have been a parallel purpose of the amendment to encourage the maintenance of the car fleet.[4] In any event, it is wasteful in the extreme and economically unsound to compel all "incentive" moneys to go into new and rebuilt cars and to allow none of it to be spent in maintaining cars in good order.

It is, of course, petitioner's position that the Congress obviously intended the railroads to have the incentive compensation to manage as they chose hoping that the existence of such an incentive would be a sufficient encouragement to cause railroads to be stimulated by the profit motive to buy and maintain freight cars in order to make money from renting them.

Petitioner respectfully submits this Court should look at the 1966 amendment, and at its legislative history, and should settle the issue presented by this litigation by deciding that the Congress did not intend when it passed the law, to grant the ICC power to interfere in the financial management of railroads and in particular, that the Congress did not authorize the Commission to order the earmarking of those funds which would result from incentive compensation.

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[4] The Court of Appeals mistakenly states that the Commission's order allows IPD funds to be drawn on to maintain cars. Appendix A, p. A-2. It does not. See discussion of this subject by the Commission. Appendix F, p. A-84.

II

The Court of Appeals Has Decided This Federal Question as to the Power of the ICC in Such a Way as to Conflict With an Applicable Decision of This Court.

In 1916, this Court in *United States v. Pennsylvania R. R. Co.*, 242 U. S. 208 (1916) held that the ICC did not have power to order railroads to buy and furnish to shippers particular types of equipment.

This case has never been overruled. Furthermore, although it may have been the opinion of Congressman Esch when he introduced amendments to the Interstate Commerce Act in 1919 which were enacted as the Transportation Act of 1920, that his proposed changes in the Act would overturn *United States v. Pennsylvania R. R. Co.* and give the Commission power to order railroads to supply themselves with cars,[3] for more than fifty years thereafter neither the Commission, the judiciary, nor the Congress has felt that the Commission did in fact receive such power.

Those cases which have considered the power of the Commission to order railroads how to spend their funds since *United States v. Pennsylvania R. R. Co.* and since the Transportation Act of 1920 have held that the Commission has no such power.

See the decision of the lower court in *Chesapeake & Ohio Ry. Co. v. United States*, 392 F. Supp. 358 (D.C. Va. 1975) and the cases discussed in the opinion at pages 366-367, and see the opinion of this Court in *United States v. Chesapeake & Ohio Ry. Co.*, — U.S. —, 44 U.S.L.W. at p. 4874, 49 L.Ed.2d at p. 24 (1976) wherein it cites and distinguishes *Interstate Commerce Commission v. United States ex rel. Los Angeles*, 280 U.S. 52, 74 L.Ed. 163, 50 S.Ct. 53 (1929), recognizing as valid the holding of that case that specific management action cannot be required by the ICC.

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[3] The opinion of the Court of Appeals, footnote 7, p. A-10 of Appendix A, quotes from a law review comment to this effect.

The Commission also continued to recognize the precedent of *United States v. Pennsylvania R. R. Co.* As recently as 1972 it acknowledged in its report to Congress that it had "no authority to require a railroad to equip itself with specified types of cars." I.C.C. 86th Annual Report to Congress 23 (1972).

If the Congress in 1966 had believed that the Commission had such authority, it would not have needed to write the amendment to Sec. 1(14)(a) authorizing the Commission to establish incentive compensation in order to stimulate the purchase of freight cars. Furthermore, if Congress had wanted at that time to grant such authority to the Commission, it surely would have written straightforward legislation granting such power as to any kind of cars determined to be in short supply rather than merely empowering the Commission to authorize *incentive* charges to *encourage* the acquisition of types of cars found to be in short supply.

What this Court said in *Interstate Commerce Commission v. United States ex rel. Los Angeles*, 280 U.S. 52, 74 L. Ed. 163 (1929), about the power of the ICC to order railroads to build a union passenger station would appear to be equally apt in considering whether or not the Commission received authority from Congress to earmark IPD funds and to condition and restrict the expenditure of such funds as it has:

> ". . . A proper statute would seem to require detailed directions, and we should expect the intention to be manifested in plain terms and not to have been left to be implied from varied regulatory provisions of uncertain scope. . . ." 240 U.S. at p. 69, 74 L.Ed. at p. 170.

Petitioner submits that despite amendments to the Interstate Commerce Act over the years since it was decided, *United States v. Pennsylvania R. R. Co.* continues to state the controlling law and the Court of Appeals in its opinion in this litigation has brought itself into conflict with such law by hold-

ing as it did that support for the earmarking order can be found in the Commission's power to regulate car service because the definition of car service was amended in 1920 to include the word "supply." From the language of the body of the opinion and footnote seven (Appendix A, p. A-10) it can only be concluded that the Court of Appeals is saying that the Commission is empowered to order railroads to equip themselves with cars.

If the power to regulate car service includes the power to regulate car supply in the sense suggested by the Court of Appeals and if the carriers have a duty (as they do under § 1(11) of the Act) to furnish safe and adequate car service, the Commission can be expected to infer from the holding of the Court of Appeals that it has the power to order carriers to equip themselves with freight cars. Such a holding is in conflict with *United States v. Pennsylvania R. R. Co.* and should be reviewed and examined by this Court.

Petitioner further points out that, in contrast to the cautious and sound approach of this Court in the *Classie* case wherein the Court stressed the limited scope of its holding and negated the implication that it was authorizing interference in the financial management of carriers, the Court of Appeals has unwisely gone beyond interpretation of the incentive per diem legislation and the question of control by the Commission over IPD funds which were the matters before it, and examining other portions of the Act, has so ruled as to imply that the Commission has authority to interfere in the financial management of carriers by ordering them to purchase freight cars with their general funds, or even to order railroads to borrow moneys for the purpose of acquiring freight cars.

In briefing the case below, the Commission did not contend that it relied upon any such broad power to support its regulation of IPD funds.[6]

[6] The Commission did mention in its brief that in a separate proceeding it had "recently asserted its authority over car ownership."

As the statements by the Court of Appeals on this subject were unnecessary to its decision as well as being in conflict with *United States v. Pennsylvania R. R. Co.*, the last Supreme Court decision on the matter, petitioner submits that for this further reason, this Court should grant certiorari and upon review bring the law in this important area back within the confines of the precedents.

CONCLUSION

Because the decision of the Court of Appeals for the Eighth Circuit holding that the ICC can earmark funds of railroads and condition and restrict the investment and expenditure of such funds presents a question of exceptional importance not heretofore passed upon by this Court and because the opinion tends to conflict with prior decisions of this Court, writ of certiorari should be granted and the law on this subject should be settled by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 75-1497

Illinois Terminal Railroad Company, Petitioner, v. United States of America and Inter-State Commerce Commission, Respondent.	Petition for Review of an Order of the Interstate Commerce Commission.

Submitted: April 12, 1976

Filed: September 2, 1976

Before VAN OOSTERHOUT, Senior Circuit Judge, LAY and WEBSTER, Circuit Judges.

LAY, Circuit Judge.

This is a petition for review of an Interstate Commerce Commission (ICC) order brought by the Illinois Terminal Railroad Company. It challenges an order of the ICC requiring specific use of "incentive per diem" (IPD) funds received by petitioner from other railroads as rental for its boxcars. In 1966 Congress authorized the ICC to establish incentive per diem rates to be charged on certain railroad car rentals. *See* 49 U.S.C. § 1(14)(a)(1966). The legislation arose from the long history of a national boxcar shortage. Since under the prior rate-setting system it was often cheaper for railroads to rent cars than to

own them, the IPD charges were intended to encourage purchasing, building, or rebuilding of boxcars.[1]

Pursuant to § 1(14)(a), the ICC promulgated an order determining the IPD rates; the duration of the charges (initially only during peak use periods (6 of the 12 months), but in 1973, during the Russian wheat sales, extended to cover the entire year); and that the IPD income had to be "earmarked" and segregated into a fund which could be drawn on by the owner railroad, under certain conditions, to purchase, rebuild, or maintain the cars.[2]

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[1] For a discussion of this history and related problems in rate-fixing, *see Boston & Me. R.R. v. United States*, 297 F. Supp. 615 (D. Mass.), *aff'd per curiam*, 396 U.S. 27 (1969); *Chicago, B. & Q. Ry. v. N.Y. S. & W. R.R.*, 332 I.C.C. 176 (1968), *aff'd sub nom. Union Pacific R.R. v. United States*, 300 F. Supp. 318 (D. Neb. 1969); *Palmer v. United States*, 75 F. Supp. 63 (D.D.C. 1947).

[2] The applicable regulations in 49 C.F.R. provide:

§ 1036.3 Earmarking.

Each common carrier by railroad shall segregate in Account 716, Capital and Other Reserve Funds and shall transfer from Account 798, Retain Income, Unappropriated to Account 797, Retained Income, Appropriated, an amount equal to the net credit balance resulting from any incentive per diem settlement involving boxcars subject to this part. The carrier shall maintain a separate bank account for the segregated funds. . . . The earmarked funds shall be reduced by the amount of the additional income tax paid as the result of increasing taxable income by inclusion of net incentive per diem earnings. The funds in such account shall be used to purchase, lease, or build new, unequipped boxcars for general service or to rebuild general service, unequipped boxcars with code numbers and mechanical designations set forth in § 1036.1 for addition to such carrier's or designee's fleet in accordance with this part. The unexpended funds remaining in the accounts of the carriers may be invested in Government's bonds or other interest-bearing, temporary securities. The interest earned thereafter shall become part of the earmarked fund.

§ 1036.4 Use of Funds.

The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with § 1036.3, may be drawn down in whole or in part at any time by the

The IPD receipts are considered as gross income for federal income tax purposes and must be reported as such by creditor-railroads. Since the IPD receipts are subject to federal income tax, the ICC ruled that only IPD amounts received *less taxes created and paid* as a result of IPD revenue are to be earmarked. 49 C.F.R. § 1036.3.

Illinois Terminal Railroad Co. has paid into the IPD fund incentive amounts received for rental of its cars. Between 1962-65 and 1967-69 petitioner suffered net operating losses (NOL) which, under Int. Rev. Code of 1954, § 172(b)(1)(C), can be carried forward and offset against future income for seven years. In the years 1970-73, petitioner had income of $3,060,-510 for federal income tax purposes, and $2,664,321 for ICC reporting purposes. Of the latter figure, $1,295,910 was directly attributable to IPD receipts. In the later years, petitioner

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carrier to build, lease equivalent of purchase, or purchase, in whole or in part, new unequipped boxcars for general service described in § 1036.1 *provided*, the carrier has in the same calendar year built, leased, or purchased its 1964-68 average acquisitions of such boxcars and made up an arrearage in having failed to maintain such average each year this order is in effect. Earmarked funds may also be used in whole or in part to lease any number of new unequipped boxcars for general service described in § 1036.1, in which the carrier is not acquiring an equity interest, *provided*, the carrier has in the same calendar year leased its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year the order is in effect. Nonequity leases must be at least 10 years in duration, and, in connection with such leases, earmarked funds must not be used for the cost of maintenance. Earmarked funds may be used in whole or in part to rebuild any number or portion of general service, unequipped boxcars described in § 1036.1, *provided*, the carrier has in the same calendar year rebuilt its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year the order is in effect. . . . However, upon application, including a showing that all parties to the proceeding herein have been notified by the carrier of such application and a showing of good cause why any carrier is unable to draw down in whole or in part the net credit balance resulting from incentive per diem settlements because it cannot comply with the above test

utilized its NOL carry forward cancelling all tax liability on its current year's income, including income from IPD receipts. Thus, there was no reduction of earmarked IPD amounts due to federal income tax payments. Petitioner, however, reported a transfer of $673,958.48 from its IPD account to general corporate funds. That amount represented the income taxes which properly would have been charged to the IPD funds had no NOL carryover been available. The ICC Bureau of Accounts disallowed the transfer. On petition for modification of that order the Commission affirmed the reimbursement order finding that the deduction from the IPD account for income taxes *not* payable because of petitioner's NOL carryover, did not come within the meaning of a deduction for income taxes *paid*. Ex Parte No. 252 (Sub-No. 1) (Feb. 10, 1975).

The railroad in its petition for review urges that the ICC lacks statutory authorization to require *earmarking* of IPD funds. Alternatively, it contends that, if the Commission has the power to

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period average requirements of having in the same calendar year built, rebuilt, leased or purchased its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect, the Commission may, in its discretion, after consideration of all views regarding the application, modify the test period average to the extent consistent with the public interest and the national transportation policy. Such modification, as a minimum, shall require that a carrier match the earmarked funds it will use with an equal amount of its own funds. Earmarked funds must be put to use within 18 months after the end of the calendar year in which the funds are collected and result in a net credit balance for the building, rebuilding, leasing, or purchasing of general service, unequipped boxcars described in § 1036.1 for addition to such carrier's or designee's fleet in accordance with this part. Upon a showing of good cause in application, including a showing that the parties to the proceeding herein have been notified by the carrier of such application may be made to the Commission for waiver of the said 18-month period, which may, in the Commission's discretion, be granted after consideration of all views regarding the application. If the earmarked funds are not used within the 18-month period, they may be voluntarily surrendered to Rail Box whose establishment and operation was approved in Finance Docket No. 27589, *American Rail Box Car Company and Trailer Train Company, et al. —For Approval of the Pooling of Car Service With Respect to Box Cars*. If the carrier fails within the stated period to put the use collected earmarked funds which result in a net credit balance, has not obtained relief from that requirement, and has not surrendered such funds to Rail Box, the Commission will investigate the matter to determine what, if any, corrective action is warranted. Appropriate corrective action would include section 16(12) remedies among others. Carriers may make temporary investments of unexpended funds in Government bonds or other liquid securities. Such securities must be readily convertible to cash so that funds remain available for boxcar purchases. Interest earned must become part of the earmarked fund. As used in this section, "build," "rebuild," "lease," or "purchase" refer to a commitment to build, rebuild, lease, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment, except that in extraordinary cases beyond the control of the carrier or the car supplier, a car that is delivered after 10 months from the date of commitment may qualify if approved by the Bureau of Accounts of this Commission.

require earmarking, the order depriving them of the deduction for NOL carryover benefits from IPD funds violates the statute, ICC regulations, and petitioner's constitutional rights.

The statute in question, § 1(14)(a) of the Interstate Commerce Act, reads:

> The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and

to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

49 U.S.C. § [illegible](14)(a) (1966).[3]

[3] Pending this petition for review the act has once again been amended by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. 94-210, 90 Stat. 31, *et seq.* to read:

> (14)(a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiate without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract agreement, or arrangement for the use of any locomotive, or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors affecting the adequacy of the national freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of freight car is adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.
>
> (b) The Commission shall, within 18 months after the date of enactment of this Act, revise its rules, regulations, and practices with respect to car service, in accordance with the amendment made by subsection (a) of this section.

Petitioner argues that Congress, through this statute, authorized the ICC only to *encourage* car ownership through the use of incentive rates and no authority to require earmarking was given. We must disagree. We find the earmarking requirement to be "a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power" to authorize IPD rates. *See United States v. Chesapeake & Ohio Ry.*, — U.S. — (1976).[4]

The Supreme Court observed in *Chesapeake*:

> The Congress has charged the Commission with the task of determining whether the rates proposed by the carriers are "just and reasonable." 49 U.S.C. § 1(5). In fulfilling this obligation, the Commission must assess the proposed

[4] In *Chesapeake* an ICC order approving a general revenue increase was conditioned on the railroads' spending the increased reve-

> rates not only against the backdrop of the National Transportation Policy, 54 Stat. 897, 49 U.S.C. preceding § 1, but also with specific reference to the statutory criteria set forth by the Congress to guide the rate setting process. These provisions, in short, require the Commission to ensure that the rate imposed on the traveling or the shipping public will support both an economically sound and efficient rail transportation system.

Id. at . . (footnotes omitted).

These same principles must guide the Commission in establishing the incentive per diem rates under § 1(14)(a). The background leading to Congressional approval of the IPD rates is well-known. The opinion of Judge Prettyman in *Palmer v. United States*, 75 F. Supp. 63 (D.D.C. 1947), pointed out that an incentive rate is "regulatory," not "compensatory," and found no authority for such a rate under the pre-1966 statute. The 1966 amendment cured that problem by expressly allowing the Commission to consider the national level of ownership and other factors in determining "whether compensation should be computed solely on the basis of elements of ownership expense . . . or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices . . . and encourage the acquisition and maintenance of a car supply. . . ." 49 U.S.C. § 1(14)(a) (1966). Under the statute, before the Commission can establish a rule, regulation, or practice aimed at alleviating car shortage it must investigate

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nue on capital improvements and maintenance of plant and equipment. In reversing the issuance of an injunction against the ICC's condition the Supreme Court held that the Commission, as a condition for not suspending and subsequently investigating the reasonableness of a proposed tariff, could require railroads to use the additional revenues for the purposes they invoked in support of the increase.

and find that there is indeed an inadequate car supply. *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1971). Section 1(14)(a) expressly states that the Commission cannot make an incentive element applicable to any type of car where it finds the supply adequate. Thus, it is obvious that the IPD charges are regulatory and not compensatory. The IPD income represents compensation above and beyond the base costs of freight car ownership. Under these circumstances the adjunct power to earmark such funds for a specific use, insuring that there will not be "profiteering" as Judge Prettyman feared,[5] is implicit in the Congressional mandate authorizing use of the IPD charge when necessary to alleviate the shortage.[6]

Analogous to the Supreme Court holding in *Chesapeake*, we find the Commission's order requiring earmarking of IPD funds directly related to the reasonableness of the use of incentive rates. It is the authorized means to accomplish the end sought. As the Court observed in *Fla. E. Coast Ry. v. United States*, 368 F. Supp. 1009, 1017 (M.D.Fla. 1973), "the earmarking of funds provision of the ICC regulation, which provides the heart and soul of the entire plan, is also rationally supported as a method helping to alleviate the shortage." (Emphasis added).

Further support for the Commission's earmarking order can be found in the express authority given the ICC to "establish reasonable rules, regulations, and practices with respect to car

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[5] *See Palmer*, 75 F. Supp. at 71.

[6] The House Report supports this view:

> If the railroads and their associations cannot meet this demanding problem [boxcar shortage], then we believe the Commission should have the *necessary tools* to solve this difficult and long-continuing dilemma.

H.R. Rep. No. 1183, 89th Cong., 2d Sess. 2227, 2230 (1966) (emphasis added).

service," 49 U.S.C. § 1(14)(a), in light of the definition of "car service" in 49 U.S.C. § 1(10) to include car supply.[7]

We turn now to the railroad's attack on the Commission's ruling regarding its NOL deduction offsetting IPD earnings during 1970-73. The Commission gave early notice that the earmarked IPD accounts could be reduced for any increase in taxes resulting from incentive per diem earnings so that general corporate funds would not have to be depleted. 343 I.C.C. 49, 65 (1973). By reason of petitioner's NOL carry-forward its IPD income during 1970-73 was offset and no tax was paid on the IPD funds. The railroad claims that this use will cause early exhaustion of its NOL resulting in increased income tax liability in future years. Thus, petitioner argues, it is being denied the benefit of its NOL deduction without receiving any benefit in return, thereby receiving arbitrary and unequal treatment. We do not agree.

The regulation provides, in part: "The earmarked funds shall be reduced by the amount of the additional income tax *paid* as the result of increasing taxable income by inclusion of net

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[7] The history is set forth in a law review commentation:

> Introducing the bill [Transp. Act of 1920], its author, Congressman, Esch, noted that certain proposed amendments to the Interstate Commerce Act were expressly intended to overrule *Pennsylvania R.R.* The addition of "supply" to the definition of "car service" in section I(10), he said, "would give the commission power to order the carrier to supply itself with cars."

Comment, *The Freight Car Shortage and ICC Regulation*, 85 Harv. L. Rev. 1583, 1599 (1972) (footnotes omitted), citing 58 Cong. Rec. 8309, 8316 (1919) (Speech of Congressman Esch, Chairman of House Comm. on Interstate & Foreign Commerce, Nov. 11, 1919, on H.R. 10453).

See also House Comm. on Interstate & Foreign Commerce, Return of Railroads to Private Ownership, H.R. Rep. No. 456, 66th Cong., 1st Sess. 17 (1919). *See also id.* at 27-28; *Hearings on H.R. 4387 Before the House Comm. on Interstate & Foreign Commerce*, 66th Cong. 1st Sess., Vol. I, at 11-12 (1919) (statement of ICC Commissioner Clark).

incentive per diem earnings." 49 C.F.R. § 1036.3 (emphasis added). The language is clear, a deduction is permitted for taxes *paid*. The purpose of the provision is to prevent a reduction in the general corporate account because of increased tax liability created by IPD income. IPD funds are to be reduced to cover for general corporate funds expended. When no taxes are paid there is no reduction in funds in the general corporate account.

Here the railroad offset IPD income for the years 1970-73 with deductions for NOL carryovers, thus avoiding paying any taxes. The savings to the railroad can be used by them for investment in its own car fleet. Avoidance of taxes on IPD income through the use of NOLs is not equivalent to the payment of taxes on IPD income with general corporate funds, within the meaning of the regulation.[8]

Furthermore, petitioner's claim that the application of its NOL carryovers against IPD income, causing early exhaustion of its NOL and increased income tax liability in future years, violates its Fifth Amendment right to be justly compensated for the taking of its property is not well-founded. The government concedes that the taxpayer cannot be arbitrarily deprived of

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[8] The Commission sets forth cogent reasons for the rule permitting a reduction of the IPD account only for income taxes actually paid. It states:

> The Commission has avoided the complications which would arise in attempting to ascertain the source of every deduction which might be taken from gross income—be it an NOL deduction, an accelerated depreciation deduction, or any other permissible deduction. The IPD account may simply be reduced when and if taxes are paid; if taxes are not paid the IPD account may not be reduced and the basis upon which taxes were avoided need not be a matter of concern. By the same token, IPD *losses* equitably may be carried back or forward to offset income from other sources, and there would be no requirement that the general tax saving be transferred to the IPD account.

Joint Brief of United States and Interstate Commerce Commission at 29-30.

this property right. However, even assuming petitioner would earn sufficient taxable income to make use of the NOL carryovers in the future, an assumption which petitioner itself conceded to be unlikely, no arbitrary taking of property will result. Under the Commission's ruling, as the government observes, petitioner will be permitted "to reduce its IPD account to the extent that (the) carrier is forced to pay taxes in future years which could have been avoided but for the use of NOL carryovers to offset IPD income." Joint Brief of United States and Interstate Commerce Commission at 28.

Given the validity of the earmarking provision and the IPD program's objective of augmenting the national car fleet, the Commission's treatment of the taxation of IPD income is just and reasonable.

The order of ICC is affirmed.

A true copy.

Attest:

Clerk
U. S. Court of Appeals
Eighth Circuit

APPENDIX AA

United States Court of Appeals
for the Eighth Circuit

75-1497 September Term, 1976

Illinois Terminal Railroad Company, etc., Petitioner, v. United States of America, et al., Respondents. } Petition to Suspend Order of Interstate Commerce Commission.

The Court having considered petition for rehearing en banc filed by counsel for petitioner and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

September 24, 1976

APPENDIX B

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 252 (Sub-No. 1)

INCENTIVE PER DIEM CHARGES—1968

Decided April 28, 1970

Upon consideration of verified statements, briefs, and statements of position filed in response to the order accompanying the interim report herein, decided December 12, 1969, the provisional conclusions and rules and regulations embodying those conclusions set forth in that report and order, modified. Rules and regulations governing incentive per diem charges promulgated pursuant to section 1(14)(a) of the Interstate Commerce Act.

Report of the Commission

By the Commission:

In our interim report in this proceeding, 337 I.C.C. 183, of December 12, 1969, we set forth tentative conclusions regarding the adequacy of the national freight car supply, and announced a provisional judgment with respect to the form and amount of an incentive per diem charge which will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense, in accordance with the provisions of section

1(14)(a) of the Interstate Commerce Act.[1] That report and appendixes, together with the accompanying order, were served on each party, each State public utility body, the Secretary of the Department of Transportation, the Association of American Railroads—Car Service Division, and the American Short Line Railroad Association. The order and its appendix were also published in the Federal Register of December 31, 1969 (34 F.R. 20438). We invited all interested parties to submit verified statements of facts, briefs, and statements of position respecting those tentative conclusions and the proposed rules and regulations contained in the appendix to the order, and any other pertinent matter. The rules and regulations therein proposed, which provide incentive per diem charges on unequipped boxcars, are reproduced in appendix A to this report.

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[1] Section 1(14)(a) provides:

The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

The background leading to the institution of this proceeding is described in the interim report. We there stated the demand for unequipped boxcars cannot be satisfied for at least half the calendar year, and tentatively concluded that an incentive increment added to the basic per diem charge during the fall and winter months, that is, from September through February, would tend to speed the use and return of those cars to their owners, or in the alternative provide a fund to augment the national boxcar fleet. In order to alleviate doubt that the incentive charge would have the desired effect on car supply, we proposed that funds derived from the incentive charge should be "earmarked" and used to purchase or build new unequipped boxcars for general service or to rebuild boxcars. The appendix to the interim order set forth a table of incentive charges proposed to be applied to the boxcars specified in the accompanying rules, depending upon the cost and age of the cars.

Procedural Matters

Certain of the verified statements which were received and various motions include requests for oral hearing.[2] The statements and motions refer to the words "after hearing" in section 1(14)(a), empowering us to establish incentive per diem, and to certain sections of the Administrative Procedure Act, as requiring an oral hearing. This is a rulemaking proceeding as defined in section 551 of the latter act. This agency's interim report and order, with attached appendices, as noted,

[2] Those filed by the Penn Central Transportation Company, the Seaboard Coast Line Railroad Company (also on behalf of the Georgia Railroad, the Western Railway of Alabama, the Atlanta and West Point Railroad, and the Chattahoochee Valley Railway Company), the Boston and Maine Corporation, and the Florida East Coast Railway Company; some also request oral argument. The Long Island Rail Road Company filed a separate motion to modify the order accompanying the interim report to provide for an oral hearing, opportunity for cross-examination and presentation of rebuttal evidence, and for the filing of briefs.

were served on each party, and the order and its appendix were published in the Federal Register, in compliance with section 553(b) of that act. No party has been prejudiced by the submission here of all the evidence in written form; and the verified statements and the replies thereto received by this agency accord the parties a hearing under section 556 of that act. Cf. *American Trucking Assn. v. Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397 (1967).

It must also be understood, as we announced in our interim report, that this is an "open-end" proceeding. Our studies regarding freight car shortage are continuing studies; and we will expect the parties to bring to our attention any evidence of circumstances requiring modification of the rules we adopt herein as experience is gained under the new regulations. The Secretary of Agriculture, for example, in a thoughful statement suggests the holding of hearings after the promulgation of the incentive plan; as the suggested action would be premature at this early date, no such hearings will now be scheduled. Hearings or further proceedings may be necessary later as experience is gained under the incentive plan. In the absence of any specific showing of prejudice, and in the interest of taking timely and needed action in this area of serious regulatory concern, the requests for oral hearing, cross-examination, and argument are hereby denied. They too may be renewed at a later date as experience is obtained with the incentive charges.

We have carefully reviewed the statements and replies of the parties. For the most part, even when critical of the interim report, they do not raise material or substantial allegations of error in that report. We have considered all the statements, replies, and motions which have been filed. We will discuss these positions, however, primarily as they assist in illuminating the basis for our decision.

Based on the submissions of the parties and the analysis of the 1968 freight car study in the interim report, we herein

adopt the rules and the scale of incentive charges attached as appendix B hereto. They differ in certain respects, as will hereinafter appear, from the proposed rules of the interim report, which are set forth in appendix A to this report.

The 1968 Freight Car Study

The nature and results of the 1968 study (appendix A to the interim report) will not be repeated in detail. Briefly, the 1968 study involved a sampling of the demand and supply conditions in 1968 for several different types of freight cars. On the basis of this study, we found that there are insufficient unequipped, general service boxcars to meet the orders for such equipment throughout a large part of the country for the 6-month period, September through February.

On January 14, 1969, we entered a further order stating that "refinements in the study program appear desirable." We accordingly proposed that the order initiating the 1968 study be expanded primarily to include additional car types.[3] No further action was taken with respect to that proposal.

The sampling plan of the 1968 study met all requirements for a scientific survey. The critics of the study point to no specific weaknesses in it. The validity of the resulting data has been checked, as we stated in the interim report, by the accepted practice of computing standard errors and related coefficients of variation for each cell of collected data. (A statistical "cell" or "data cell" refers to each number having statistical significance. The word derives from the fact that the intersection of a row and a column in a statistical table forms a box or cell.) Some data were rejected due to high variability; but it is not unusual for a few data cells to be rejected in a large

[3] The 1968 study covered 13 types of freight cars. The 1969 order proposed expansion of this coverage to 19 types.

and complex study. All of the remaining cells contain data that are statistically valid. The rejection of a few data cells having high variability tends to increase the reliability of the complete study results which are highly acceptable according to probability standards applicable to a complex nationwide sample survey of this kind.

Penn Central seeks to explain some of the delays experienced by shippers by conceding that "a significant proportion (25 percent-30 percent) of all freight stations are served on a less than once-a-day basis." It argues in terms of a Monday-Wednesday-Friday "schedule for deliveries," as if no delay can occur when a carrier has institutionalized a "schedule." Obviously, if its shippers placed orders in the 1968 study for immediate delivery of cars—which were filled late because of the "schedule," or because that day's train had already left, or for any other reason—the shippers nevertheless experienced a delay in service; and such delay, to whatever extent it occurred, is properly considered by us in determining whether the availability of cars was sufficient to meet the shippers' demands for service.

The 1968 study does not assume, as it is alleged, that the railroads must in all cases supply cars for loading within 24 hours. The primary demand factor relied on in the study was comprised of (1) unfilled orders for which placement was requested prior to the study day, (2) orders filed on a prior day requesting placement on the study day, and (3) order filed on the study day requesting placement on that day. The basic demand statistic, therefore, indicated the carriers' performance in filling orders on a current basis, rather than within 24 hours.

The comment was made in one or more of the statements that no shortage is shown, since only 1.3 cars of every 100 were not furnished in 1968. This comment fails to take into account the long delays experienced by many shippers ordering cars. During the 12-time periods of the study, there were

over 273,500 unequipped boxcars delivered after delays of more than 2 days; and 36,000 of those cars were delivered after delays of more than 12 days.[4]

Others seek to equate the percent of failures to place cars with the present of the audits in which overordering was found. No such correlation is possible on the present record. The car placements were made in response to orders for placement on or before the study day, and are unrelated to the study by our car service agents of orders received at certain stations.

Penn Central urges that marketing and operations studies are needed before any incentive per diem may be prescribed. It suggests that such information is "not readily available" without ever stating expressly that the studies are presently unavailable to it. More importantly, Penn Central does not show by any specific evidence that it is unable to improve the utilization of boxcar equipment or expedite delivery of cars on its own lines, or that incentive per diem will not affect utilization. It merely claims, again without specific evidence, that more cars will merely augment the carriers' surpluses.

Certain parties also allege without supporting data that shipper delay is the primary cause of boxcar shortages, and complain that the 1968 study fails to take this into account. We are aware that the boxcar shortage is a many-sided problem. This proceeding seeks to test whether a financial incentive can be employed to augment the car fleet. We do not assume that incentive per diem is the only remedy; on the contrary, we would urge the industry and the shippers to cooperate in studying the causes of whatever shipper delay may exist and to avoid unnecessary delays in the loading and unloading of cars.

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[4] A preliminary staff analysis of the freight car study was presented to the Senate Subcommittee on Surface Transportation. We have not relied on that analysis in the writing of the interim report and this report, and will refer to the underlying data of that analysis only insofar as they are pertinent to our own analysis.

The statements of shipping interests of record and our own long experience with the Nation's car service problems support the finding of a national boxcar shortage. The 1968 study, besides affording valid statistical evidence of this shortage, gives us valuable assistance in analyzing the problem and settling upon the best remedy now available to us consistent with the purposes of section 1(14)(a).

We find that the 1968 study provides us with adequate data to support the action taken in this report and order. We further find, on the basis of this study and the submissions of the parties, that the supply of general service, unequipped boxcars is not adequate to meet the orders for such equipment throughout a large part of the country for the 6-month period, September through February. In the interim report and in this report, we have clearly not attempted to resolve all issues concerning the national freight car supply, but only those that permit a logical determination of the requirements for unequipped boxcars. As our study of other car types continues, and as we gain experience under the incentive per diem charges adopted herein, modification or expansion of the rules and charges may well be required.

Incentive Per Diem Charges

Limiting the incentive charge to unequipped boxcars.—The interim report and the adopted rules limit the incentive charges to apply on unequipped boxcars. Several shippers and carriers suggest that the charges should be expanded to apply on more types of cars, such as covered hopper cars.

In this proceeding we are giving first priority to the boxcar. The data we have reviewed clearly show the national boxcar shortage, and indicate wherein an incentive may usefully serve to alleviate the shortage. More study of the data relating to

other cars is necessary. Limited application of the incentive charge at the outset should more readily permit us to measure its effectiveness.

The Seaboard Coast Line complains that it will not receive incentive per diem under the proposed rule when its equipped, expensive, and more modern boxcars are on other lines. It overlooks the scale of basic per diem charges,[5] which provide larger per diem payments for the more modern and more expensive cars. For example, for a $5,000 boxcar that is 20 years old, the basic per diem (time charges) is $1.50; but for a 5-year old boxcar costing, let us say, $16,000 the basic per diem (time charges) is $4.45.[6] Seaboard, like all other carriers that have continued to purchase the new and more expensive cars, will receive fair compensation.

The issue presented, however, chiefly concerns how best shall we move forward to enlarge the boxcar fleet. The economies to be realized in the operation of certain cars and the competitive need for specialized equipment provided incentives for the carriers to continue their purchases of those cars. In the meantime, the boxcar remains the "workhorse" of the fleet, and we have not been shown evidence that it can or will be replaced in that role. On the contrary, its primary role remains and yet the number of boxcars in active service has declined, resulting in the unsatisfied demand that the 1968 freight car study helped us to analyze. The interim report proposed a logical beginning to meeting this problem under section 1(14)(a).

Amount of incentive per diem on unequipped boxcars.—We have proposed, and we herein adopt, an incentive per diem on unequipped boxcars based upon increasing the rate of return

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[5] As prescribed in *Chicago, B. & Q. R. Co. v. New York, S. & W. R. Co.*, 332 I.C.C. 176 (1968).

[6] See also interim report, appendix B.

on investment allowed car owners in the basic per diem proceeding from 6 percent per year to an overall 12 percent per year. As we stated in the interim report, such a rate should bring returns on investment in unequipped boxcars comparable to the higher average returns earned by nonregulated corporations,[7] thereby making investment in the national boxcar fleet a desirable alternative investment.

The parties propose a number of alternative approaches to the amount of incentive charge. One carrier proposes a flat rate of $5 per car regardless of the car's age or cost; another proposes a variable charge; and others merely seek to have us impose unspecified higher charges.[8] No evidence was produced by these parties beyond the opinions of certain railroad officials, with whom other officials and shippers disagreed, that the proposed scale would be ineffective as an incentive. As one railroad official stated,

> * * * To flatten the rate would be to overreward the owner of the older, obsolescent cars, and to under-reward the owner of newer, more modern cars. The new cars get more use; they are able to carry more lading; they need less "down time" for maintenance and repair; and they have many advantages over older cars, deriving from the constant development of the technology of car design and construction. A flat rate is not as much of an incentive to the

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[7] The rate of return was computed from balance sheet and income figures compiled by the Internal Revenue Service, and included corporations having no income in the period as well as corporations earning very high rates of return. The study in our view produced a reasonable average figure reflecting the typical experience of unregulated companies and a gauge of the incentive to disinvest in the railroad industry, and hence a reasonable measure of the incentive needed to encourage such investment.

[8] Several parties urge that the proposed incentive scale is too high; but none has shown that the proposed charges would impose an undue burden on it or on any group of carriers.

acquisition of new cars as is a rate scale related to age and original cost.

The data we have seen convince us that no higher average rate of return than 12 percent is needed to serve as a reasonable incentive, and that a higher figure would, therefore, provide unjust and unreasonable compensation to freight car owners.

Besides the potential rate of return, there are several other factors arising out of this proceeding that should tend to produce a renewed consideration of investment in the boxcar fleet by the railroad industry. The earmarking requirement, which we considered in the interim report and adopt herein, is a significant factor. But beyond that requirement, certain debtor roads will also be given an incentive to invest in the boxcar fleet.

As we stated in the interim report, we cannot be certain that the incentive per diem will increase the car fleet by any substantial number, or, if it succeeds in that respect, that it will alleviate the car shortage. Nevertheless, we believe the new charges coupled with the rule governing the implementation of the charges should produce improvements over a period of years.

Some of the parties seem to desire an unattainable certainty regarding the effect of our decision before any decision is reached and prior to the implementation of the statute. Only with actual experience can we determine the precise effect our decision will have; and for this reason, among others, we have emphasized that this proceeding will remain open for the submission of representations and data as experience is gathered under the new incentive charges.

Six-month application of the charges.—In the interim report we proposed to apply the scale of incentive charges over a period of 6 calendar months of each year. The report proposed that the carriers earn a rate of return of 6 percent as part of the basic per diem in the March-August period, and a rate of return of 18

percent in the September-February period through both the basic and incentive charges. An overall 12-percent rate of return would result for the annual period.

As we stated in the interim report, the use of an 18-percent return in the heavy-loading period should stimulate the faster return of cars in a period showing a regional imbalance in car supply, and should stimulate some debtor railroads ("debtor" in terms of net per diem balances) to purchase cars. The entire incentive amount would apply in the heavy-loading period of most debtor roads and hence in their period of greater ability to pay—or to invest in equipment.

A few railroads suggest that the September to February period does not reflect *their* heavy-loading period; others suggest that incentive per diem should apply throughout the year. The 1968 data show the September-February period was a heavy-loading period both nationally and regionally. The few exceptions of record do not disprove the findings based upon this data. Moreover, the individual need of particular carriers for cars in the March through August period can be remedied by service orders or car distribution directives. In the meantime we seek national solutions to the national 6-month shortage.[9]

The effect of a 6-month application of the incentive rate of return should be to improve performance over a 12-month application of such return. The 6-month allowance of an 18-percent rate of return should bring to the creditor lines a reasonable annual return of 12 percent,[10] plus the additional bene-

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[9] Penn Central argues that the lack of local conditioning and storage facilities for grain is "the base problem;" but quickly adds that "service orders which move cars interregionally do not solve the problem. They merely shift it to another location," apparently conceding the national shortage of cars.

[10] Of course, we could not increase the incentive rate of return to 18 percent throughout the year, since an overall annual rate of return of 18 percent would exceed a reasonable level of compensation to freight car owners.

fits resulting from a bunching of the incentive element in the 6-month period. If better utilization results from this bunching of the collection of the incentive return, as we believe it will, the effect of better utilization should also spill over into the other months.

Another matter relating to the application of the incentive charge raised by the parties concerns the length of time it will apply. We cannot now foresee the termination of the incentive charge. The shortage of boxcars has been with us for years, and will not easily be solved, nor remedied in the near future. We do not reach any of the several problems suggested by a few railroads that might arise upon the termination of the incentive charges. None of the problems seems insurmountable, and each can be resolved when a discontinuance of the incentive is in fact considered.

Earmarking requirement.—We proposed in the interim report that net incentive balances, i.e., the excess of incentive charges received by a railroad over those paid by it, should be set aside as earmarked funds for the purchase, building, or rebuilding[11] of general service, unequipped boxcars. We did not specify any particular size of boxcar, but only that it must be an unequipped and general service boxcar.

We adopt the earmarking requirement in our final order. We believe the various fears expressed by the parties—that earmarking will unduly restrict the investment of railroad funds, or even provide an overabundance of boxcars—have not been supported. Earmarking, as the spokesman for the Southern Railway System Lines aptly states, alone insures that the funds will be used as intended and hence is "the key to accomplishing the objective of the plan."

[11] By "build," "rebuild," or "purchase" we refer to a commitment to build, rebuild, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment.

The statute, of course, does not seek to remedy any alleged "imbalance" in the ownership of cars between creditor and debtor railroads. Besides the fact that no particular national advantage would necessarily flow from having the debtor roads own all cars purchased from incentive funds, the statute requires us to recognize and preserve entitlement to incentive charges based on the ownership of cars when it refers to an incentive charge that provides "just and reasonable compensation to freight car owners."

We do not foresee an overabundance of plain boxcars on line of the owning roads as a result of the incentive charge. Such roads are generally the very railroads that show the most serious need for cars in the heavy-loading season. The parties making this charge present no data or any study to support their contention.

As in the interim report, we do not prescribe the timing of purchases. If traffic of particular roads falls off, they may desire to postpone purchases. The earmarked funds must eventually, however, find their way into the purchase, building, or rebuilding of the general service, unequipped boxcar, the type of car we have found to be in short supply.

In the absence of earmarking, the net incentive balances would obviously be deposited in the general funds of the railroads, which could then be expended for many purposes having little or nothing to do with the purposes of the statute. The statute was not adopted to provide the railroads with merely increased compensation for the use of cars. Such a result furthermore would be contrary to our findings in the basic per diem proceeding.

The net balances derived from the incentive charge are not properly part of the general working capital of the recipient railroad. Railroad cars other than boxcars are not here found

to be in short supply; purchases of such other cars, or for that matter, funds to make road improvements, must come from other sources. On the other hand, one of the subjects for future study, as the incentive program progresses, must also be the interchangeability, if any, of other types of cars with plain boxcars. Complete interchangeability between the boxcar and any other type is not shown of record.

The witness for the Southern Railway suggests a modification of the earmarking requirement to provide for earmarking of only the net balances after income taxes. The suggestion has merit and our form of the modification will be incorporated in the adopted rules.[12]

Five-year average.—The rule we proposed and herein adopt would require the beneficiary of the net credit balances resulting from incentive per diem to expend those balances only for building or purchasing new general service, unequipped boxcars, or for rebuilding older cars of such type, beyond their normal outlays of funds for such purposes. We accepted each carrier's average number of cars purchased, built, or rebuilt in the 5-year period 1964-1968 as representative of their current outlays. Our purpose here is to insure not only that the incentive charges are used for the purpose intended (and hence "earmarked"), but also that the incentive program stems the present downtrend in the national supply of plain boxcars.

Some railroads urge that the 5-year average penalizes those roads which purchased or acquired a larger than average proportion of the total purchases of general purpose boxcars in the period. They add that, similarly, those roads which pur-

[12] We later provide for the inclusion in the incentive program of the Canadian lines and intend that a Canadian line shall transfer the net incentive balances to a United States carrier for investment. The Canadian line would transfer a balance net of taxes and its transferee would invest the net balance without any further deduction for taxes. The plan is discussed in detail at a later point in this report.

chased less than the average are rewarded by being permitted to more readily draw down funds. There is no showing that any expenditure for boxcars during the 5-year period was made in expectation of the interim report. Each railroad that purchased cars, or delayed its purchases, did so for business reasons unrelated to this proceeding. Contrary to what a few carriers allege, we here recognize there were many managerial decisions underlying the purchase or failure to purchase boxcars, and the building or rebuilding and failure to build or rebuild boxcars, in the past. We merely plan a future course with those decisions fully in view.

There is no "reward" and there is no "punishment" in fact or intended in our use of the 5-year average. If the Congressional purposes to augment the car fleet and to improve utilization are to be met, there must be some base from which to build. Otherwise, there is no standard to measure and hence prevent the continual decline of the boxcar fleet. In the absence of the 5-year average, the creditor railroads could simply use the incentive funds to purchase their ordinary car replacements and maintain the present declining rate of such replacements. This would not be a satisfactory response to the shipper requirements for additional boxcars shown of record.

One of the parties suggests a "moving average" as an alternative to the 1964-1968 period average. The moving average would apparently be reconstructed each year by using the more current year as the fifth year in the computation and by dropping the oldest year. Such an approach, however, would dilute the average, and bring the same decline in boxcar supply which we have seen in the past. A moving average would reward creditor carriers, which failed to buy any cars in future years, with a declining requirement to buy cars. A moving average would not, therefore, be a suitable substitute for the 1964-1968 period.

A somewhat different approach is suggested by another party. Rather than make a frontal attack on the average, one of the

parties suggests that a carrier should not be required to make up accumulated arrearages in its car purchases after making the average purchases in any one year. For example, if a carrier purchased no boxcars in the first year under the incentive order, and none in the second year, the suggestion is that the carrier should be required to purchase only its 1964-1968 average in the third year before dipping into the earmarked funds. Like the moving average, this approach would merely dilute the requirement of prior average purchases before using earmarked funds; and we have, accordingly, added clarifying language to section 1036.4 of the adopted rules.

In the interim report, we stated that for some carriers "it may be relatively easy to gear annual purchases to their 5-year average. For others, it may be necessary to defer annual purchases from the fund until the need arises for the purchase of cars in excess of the 5-year average." We here referred to the practice of many railroads of buying large quantities of equipment at one time, rather than a uniform amount each year. We did not seek to require each railroad to purchase or build an annual number of cars uniformly corresponding to its 1964-1968 average. We likewise did not intend to excuse a railroad when it accumulated a quantity of underpurchases from a prior period.

To illustrate our meaning, let us postulate two carriers ("A" and "B") each having a 1964-1968 average of 100 annual boxcar purchases. Let us further assume the following purchases in the first 3 years following our adoption of the incentive order:

	Boxcar purchases	
Year	Carrier "A"	Carrier "B"
1	0	0
2	0	0
3	400	150

We intend that carrier "A" should be permitted to purchase 100 general service, unequipped boxcars in the third year by using any portion of the earmarked funds; the first 300 boxcars purchased in the third year would have to be financed solely from other funds. Carrier "B," on the other hand, would not be permitted to use any of the earmarked funds for purchase of any of the 150 cars in the third year. It accumulated in our hypothesis a backlog of 200 cars in the first 2 years, and would be required first to purchase those cars, plus another 100 for the third year, before using earmarked funds.

We shall continue to rely on the 1964-1968 period.[13] We have not been shown evidence that any road purchased an excessively high number of boxcars in that period for tax reasons or any other reason. The period is long enough and yet recent enough to provide, as we stated in the interim report, a fair gauge of the current, albeit inadequate, response of the railroad industry to the demonstrated need for additional boxcars.

Requests for Exemption and Inclusion

Requests for exemption.—Section 1(14)(a) authorizes this Commission to exempt a "group of carriers" from paying an incentive element if found to be in the national interest. An earlier version of the statute in the Senate authorized an exemption to specified carriers, such as those "which terminate a substantially higher percentage of interline traffic than they originate."[14] The more general language adopted by Congress

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[13] Southern proposes a change in the language of section 1036.4 which we do not adopt. It suggests striking the words "its 1964-1968" in the two places they appear, and adding at the end of each sentence "that it built or purchased annually during the years 1964 through 1968." We do not intend that a carrier first purchase from other funds what it purchased "annually," but rather that it first purchase its 1964-1968 average.

[14] S. 1098, 89th Cong., 1st Sess.

grants both the power and the duty to exempt a group of carriers only when this Commission finds it to be in the national interest.[15]

The Louisville and Nashville Railroad (L&N), proposes that all carriers be exempted from paying incentive per diem for the first 15 days after each interchange. The L&N argues that such an exemption would induce the prompt return of cars and at the same time provide "a reasonable length of time" for the using line to handle the car efficiently. It nowhere supports a standard of 15 days; and we fail to see how such a lengthy period would be justified for each and every haul of any length following interchange. Another basic objection to the L&N's approach is that it confuses the objectives of incentive per diem with "penalty per diem," a matter that has been discussed in the context of the Commission's authority under section 1(15) of the act.[16] The exclusive purpose of the penalty would be better utilization. Unlike penalty per diem, an important function of incentive per diem is to create a fund and incentive for the acquisition of boxcars.

Several railroads seek the exemption of different groups of carriers from payment of the incentive per diem. The Long Island claims that Congress intended to exempt all the predominantly terminating railroads of the Northeast section of the Nation. In its view, once a railroad establishes that it terminates more cars than it originates, thereby experiencing a surplus of cars on its lines, it is entitled to an exemption. It also alleges that "the large percentage of detention" occurs on its lines "while the car is in shippers hands;" it, therefore, avers that incentive per diem would not cause it to acquire cars, in view of the large number of

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[16] *E.g.*, see "Review of I.C.C. Policies and Practices," Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st sess., pages 105, 343-44.

[15] See *e.g.*, remarks of Senator Cotton, 112 Congressional Record 10250-51 (1966).

surplus empties continuously on its tracks, but merely add to its deficit freight operations. The Florida East Coast Railway, among others, makes similar arguments in favor of an exemption. It shows that, as a predominantly terminating railroad, it continuously has a surplus of boxcars on its lines, and asserts that it now operates efficiently and possesses a sufficient number of cars to protect its loadings.

We have given careful consideration to the requests of the several terminating railroads for an exemption. In our view, it would not be in the national interest to exempt a group of carriers merely because they terminate a substantially greater number of carloads than they originate, or because they already own a sufficient number of cars to satisfy their own needs.

The statute requires incentive per diem both to contribute to car utilization and distribution, and to encourage the acquisition and maintenance of an adequate car supply. The terminating roads that have requested an exemption argue that they cannot be expected to add to the national car fleet by direct purchase; nevertheless, they can be expected to contribute to improved car utilization, given the incentive to do so. Moreover, a terminating railroad, like any other railroad, has a substantial interest in the maintenance of a national car supply, whether by direct purchase, or indirectly by better enabling the creditor roads to augment the car fleet.

The statute also refers to providing just and reasonable compensation to freight car owners. As we explained in the interim report, this refers to compensation for risks beyond those included in the basic per diem charges which may be considered by us in seeking to alleviate a shortage of cars. The terminating roads should in fairness bear a portion of the cost of these additional risks.

The terminating lines complain that, unlike debtor per diem railroads such as Penn Central, they do not as a practical matter

have the choice to purchase additional equipment or to pay incentive per diem. Their purchase of additional equipment may not be economically feasible. But our giving carriers such as Penn Central the choice denied to the terminating lines has not lessened the burden on Penn Central. The debtor railroads are treated equally, since the financial cost of those carriers that decide to purchase cars directly will not be any less, and may be more, than the cost of incentive per diem.

The argument is made that the incentive charges should not apply to a bridge carrier which is required to receive cars as a connecting railroad for delivery to another railroad. Such a carrier would pay incentive per diem for the same reason it pays basic per diem, namely, that as a bridge carrier it enjoys a division of the revenue and hence should bear a portion of the expense and investment. A like response pertains to the argument that incentive charges should not apply when a car movement is outside the "control" of a particular railroad, such as in the hands of a shipper for loading or unloading. Both basic and incentive per diem charges place the burden on the carrier nearest in time (and generally distance) to the point of loading or unloading, and among all other railroads (including the owner), such a carrier fairly bears the per diem burden.

While a car is under load, the road on which the car is located benefits from use of the car, and it is only logical that the road should be charged with the capital costs of using the car. Incentive per diem charges represent such costs because they are required in order to stimulate the amount of investment in freight cars necessary to provide adequate car service. Railroads also look to the handling of loaded cars as an area for improvement in overall car utilization. Improved yard and communications facilities help expedite the movement of loaded cars through terminal areas and through the classification process. Incentive per diem charges while cars are under load should tend to encourage investment in those facilities. Even when cars are under

the control of shippers and consignees, the car days consumed in such use should be accounted for in freight revenues from the loaded movements associated with the free loading and unloading time. Charging the railroads incentive per diem while cars are under shipper control should induce the roads to be more attentive to the proper application of demurrage charges.

The Boston & Maine Railroad (B&M), in a "statement" of its attorney suggests it "intends to adduce evidence" which will show that an exemption should apply to "many railroads" on account of their dire financial condition or markedly lower rate of return on investment. Since B&M presented no evidence of such a condition applicable to any railroad, as it alleges, we fail to see the pertinence of its allegation. B&M and other carriers emphasizing their financial condition either fail to show the dollar impact of the proposed incentive per diem at all, or having shown the dollar cost fail to demonstate that such cost is a substantial portion of their revenue and is unduly burdensome. In addition, the basic per diem costs of some carriers should be less than their present costs when the new scale of basic charges become effective. They further fail to show that the burden, if any, should somehow take precedence in the national interest over the role a terminating railroad can play in the Congressional plan for augmenting the national car fleet and improving car utilization.

The switching and terminal carriers that seek an exemption do not show such an exemption to be in the national interest. These carriers pay per diem on all cars they handle subject to a reclaim allowance from the connecting trunkline carrier. For the first 7 days that cars are in its control, the Brooklyn Eastern District Terminals, for example, is entitled to reclaim of per diem from the line-haul carriers, which will also apply to incentive per diem. The New York Dock Railway, on the other hand, pays no per diem. No showing is made that the payment of incentive per diem will substantially increase the per

diem bills of any of these railroads; but even if an increase will occur, it will occur only after the expiration of reclaim periods, which should be adhered to, or perhaps renegotiated, or if too restrictive, prescribed by us.[17]

Incentive per diem will, like basic per diem, be subject to the present reclaim arrangements between railroads. The switching and terminal railroads, therefore, will be liable for incentive per diem just as they now are liable for the basic per diem payments.

Rate and division adjustments may be required as a result of incentive per diem. We do not reach the questions inherent in the statements filed by several carriers, for example, as to whether there should be any increase in the tariff rates and charges on account of increased per diem costs. Any such proposals must be presented to us in tariff form subject to the statutory notice provisions and our authority to suspend and to investigate.[18]

A few switching and terminal companies and short lines urge an increase in demurrage to offset incentive per diem.[19] Since the line-haul rates necessarily reflect the present cost to the carriers of the free-time allowance, free time at the ports, and demurrage, it may be that the incentive charge will require

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[17] The Terminal Railway Alabama State Docks, a railroad wholly owned by the State of Alabama, alleges that it cannot prevent intrastate shippers from defeating the incentive charge. It argues that as a matter of State law, a penalty charge for the use of equipped boxcars applies to interstate, but not intrastate, shippers, and accordingly, intrastate shippers may shift to the use of the more valuable equipped boxcars at a lesser per diem cost. The State's self-imposed limitation on applying the penalty charge should not defeat incentive per diem; rather, the practice may unduly discriminate against interstate commerce and hence be an unlawful practice governing intrastate shippers.

[18] Similarly, rate adjustments may be required for intraterminal, interterminal, post and intraplant switching. We express no opinion.

[19] Other switching and terminal carriers argue, on the other hand, that increased demurrage would simply result in loss of traffic.

future adjustment to reflect the increased per diem costs. However, no evidence has been presented on these questions, and the new basic per diem charges should decrease the per diem costs of some railroads. Accordingly, we do not reach the effect of incentive charges on free-time allowances and demurrage charges on this record. We will entertain specific proposals from the carriers to deal with such questions when the need and the evidence are presented.

In this area, as in others relating to incentive per diem, we do not close the door to later revision of our order. Following a period of actual experience under our order, if incentive per diem imposes an undue burden on any railroad, or otherwise requires revision, we will entertain, and indeed expect, specific proposals from the parties to this proceding. Accordingly, we are unable to find that it would be in the national interest to exempt any groups of railroads from the payment of incentive per diem charges at this time.

Requests for inclusion.—The interim report exempted all Mexican and Canadian railroads from the payment of incentive per diem. Eleven Canadian railroads request to be included in the incentive program. The two major Canadian railroads are the Canadian Pacific Railway Company and the Canadian National Railways. The former is a publicly owned stock company and the latter is wholly owned by the Government of Canada.

The Canadian Pacific was incorporated pursuant to an act of the Parliament of Canada in 1881, and currently operates over 16,000 miles of railway in the United States and Canada. Among its controlled lines in the United States is the Soo Line Railroad Company. Canadian Pacific owns 704,953 shares of common stock of the Soo Line, and has the power to vote an additional 7,850 shares, which together constitute 56.37 percent of the total voting power evidenced by the Soo Line's outstanding shares. The Soo Line owns over 6,000 general service,

unequipped boxcars, and over 1,500 general service equipped boxcars.

The Canadian National operates over 23,000 miles of main-line track in Canada and the United States. It maintains numerous connections with United States carriers. It has three wholly owned subsidiaries which operate entirely in the United States, including the Central Vermont Railway, the Grand Trunk Western Railway (which owns and operates 879 miles of track), and the Duluth, Winnipeg and Pacific Railway.

The additional eight Canadian railroads which join in the request for inclusion, are the following:

Algoma Central Railway
Canada and Gulf Terminal Railway
Essex Terminal Railway
Napierville Junction Railway
Northern Alberta Railways
Ontario Northland Railway
Roberval and Saguenay Railway Company
Toronto, Hamilton and Buffalo Railway

Each of these carriers is a private or public stock company, except the Ontario Northland, which is owned by the Government of Ontario; and the Northern Alberta Railways, which is owned in part by the Canadian National and in part by the Canadian Pacific.

These railroads argue in a joint pleading that per diem charges must be uniform throughout Canada and the United States. If incentive did not apply to Canadian cars, the Canadian railroads state, (1) United States carriers would, whenever possible, use the many Canadian cars that come into this country and unduly delay their return to Canada; and (2) originating United States carriers would tend to promote the routing of their cars via United States lines (to earn greater per diem), and hence discourage use of possibly faster Canadian routes. As part of the

delayed return of Canadian cars, the Canadian roads foresee that their cars would be loaded last in the United States, held for loading more often than comparable United States cars, repaired last, and use for traffic where the cars are slow in releasing.

The data presented by the Canadian National and the Canadian Pacific show the following distribution of boxcars in heavy-loading period (September-February) since 1964:

Canadian National Boxcars

Period	CN total average inventory	CN boxcars on U.S. lines		U.S. boxcars on CN lines	
		Average	Percent[1]	Average	Percent[1]
September-February 1964-1965	56,353	10,296	18.3	4,603	8.2
September-February 1965-1966	55,454	10,917	19.7	4,917	8.9
September-February 1966-1967	55,556	9,688	17.4	4,394	7.9
September-February 1967-1968	50,645	9,433	16.7	3,027	5.3
September-February 1968-1969	57,019	11,496	20.2	3,663	6.4

Canadian Pacific Boxcars

Period	CP total average inventory	CP boxcars on U.S. lines		U.S. boxcars on CP lines	
		Average	Percent[1]	Average	Percent[1]
September-February 1964-1965	51,056	8,589	16.8	2,214	4.3
September-February 1965-1966	51,357	9,546	18.6	2,663	5.2
September-February 1966-1967	50,694	8,056	15.9	2,370	4.7
September-February 1967-1968	49,063	6,973	14.2	2,213	4.5
September-February 1968-1969	48,422	8,008	16.5	2,397	5.0

[1] Percentage of total inventory.

The data indicate that a substantial number of Canadian boxcars are on United States lines in the heavy-loading period, and that these Canadian carriers are substantial creditor lines insofar as per diem payments are concerned. The data also show that by far the major portion of the Canadian fleet is in service within Canada during this period, and that the level of United States usage of Canadian cars has not substantially varied from year to year.[20]

The Canadian railroads present a convincing argument that the complete elimination of the Canadian railroads from the incentive program could create dislocation of equipment and reduce car utilization. We are not convinced, however, that their inclusion in the program on the same footing with United States carriers can as a practical or legal matter be accomplished.

The Canadian railroads are subject to our jurisdiction only to the extent they operate within the United States. They do not file annual reports of their entire operations with us. The Canadian National, for example, states on this record that it owns 55,401 boxcars as of January 1, 1970. For the year ended December 31, 1969, its relatively minor lines operating in the United States reported the following ownership of boxcars in their respective annual reports to us:

Reporting carrier	Reported boxcars owned
Canadian National Lines in Michigan	None
Canadian National Lines in New England	2
Canadian National Lines in New York	None
Canadian National Lines in Vermont	None

Besides the paucity of data, the Canadian lines appear to concede that our lack of control over their operations could lead to

[20] Similar findings pertain to the annual data of record for the two Canadian roads.

divergencies from the rules we adopt to govern the application of the incentive charges.

A further serious question is presented by the fact that the application of incentive charges on Canadian cars, and full compliance with earmarking, could not likely increase the number of Canadian cars in the United States. On the contrary, even if the Canadian carriers fully complied with our order on a voluntary basis, the practical effect of incentive charges would likely be that United States carriers would be paying for the enlargement of the boxcar fleet *within* Canada.

It seems clear to us, therefore, both that the Canadian railroads are entitled to relief from the specific problems they describe, and that special rules must apply to the Canadian railroads, if they are to be included in the incentive program. Let us then turn to the specific problems described by those railroads.

First, the Canadian railroads allege that originating United States carriers may route the cars owned by United States railroads around Canada rather than over the more direct Canadian routes. This is more a problem of the application of the incentive charges on United States cars than on Canadian cars; and hence we find that incentive charges should continue to apply on United States boxcars whether moving within the United States or in Canada, in the same manner that basic per diem applies to United States cars while in Canada.

Second, the Canadian railroads maintain that United States carriers will unduly delay the return of Canadian cars, if incentive charges do not apply to the latter cars. To remedy this difficult, but clearly potential, problem we find that incentive charges shall apply on Canadian boxcars in like manner and subject to the same rules applicable on United States boxcars with the exceptions described below.

In section 1036.1, set forth in appendix A of this report, the phrase "the owning railroads" shall be changed, as it applies to Canadian carriers, and the following will be added:

or the United States class I railroad which is designated by the owning railroads of Canada, * * *

We will add at the end of the first sentence of section 1036.3: "and shall maintain separate accounts for funds received on Canadian owned boxcars." And we will add the following new third sentence in section 1036.4: "Net balances on Canadian owned cars may be drawn down once the designated carrier has built, rebuilt, or purchased its 1964-1968 averages as set forth above; but such drawdowns shall not affect the carrier's accumulation of arrearages resulting from prior failure to build, rebuild, or purchase its 1964-1968 average." These provisions should insure that the Canadian funds do not dilute the incentive rules as they relate to the United States railroad receiving the net balances on Canadian cars.

The Canadian National and the Canadian Pacific should have no difficulty in designating their major United States subsidiaries to receive the incentive per diem on their cars. We are not advised concerning the number of cars owned by the smaller eight Canadian railroads. If they anticipate or in fact experience unusual difficulties in designating a recipient of the charges, we will entertain specific proposals from them.

Clearly, by having the incentive charge apply on Canadian cars and yet be payable to a United States carrier, we both solve the specific problem of delayed return of cars described by the Canadian roads, and the new problems that would be created if the incentive charges applied without the changes we have directed. The incentive charges, subject to the rules for their application, as modified herein, will accord fair and reasonable treatment of the Canadian carriers.

Ultimate Findings

We find and conclude that the rules and charges set forth in appendix B hereto will provide just and reasonable compensation to owners of general service, unequipped boxcars, contribute to sound car service practices, including efficient utilization and distribution of cars, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

An appropriate order will be entered.

Commissioner Bush, being necessarily absent, did not participate.

APPENDIX A

[Appendix A consisting of rules and regulations proposed in the interim report is omitted.]

APPENDIX B

Adopted rules and regulations

Part 1036—Incentive Per Diem Charges on Boxcars

§1036.1 *Application.*—Each common carrier by railroad subject to the Interstate Commerce Act shall pay to the owning railroads or the United States class I railroad which is designated by the owning railroads of Canada the additional per diem charges set forth in § 1036.2 on all boxcars shown below,

Mechanical designation	*Code number*
XM	B100-109, B200-209, B300-309
XMI	B110-119, B210-219, B310-319
XMIH	B120-129, B220-229, B320-329
VA	B040
VM	B050
XC	B060
XCI	B070
XU	B080

while in the possession of nonowning railroads and subject to per diem rules. These charges are in addition to all other per diem charges currently in effect or prescribed. Mexican owned cars are exempt from the operation of these rules. The rules of this part shall apply regardless of whether the foregoing boxcars are in intrastate, interstate, or foreign commerce.

§ 1036.2 *Amount of incentive charge.*—The incentive charges applicable in each cost bracket by age group are set forth below:

Amount of incentive per diem on boxcars (Collectible in 6 months in each year)

Line No.	Cost bracket (1)	Group A 0-5 years (2)	Group B 6-10 years (3)	Group C 11-15 years (4)	Group D 16-20 years (5)	Group E 21-25 years (6)	Group F 26-30 years (7)	Group G over 30 years (8)
1	$0- 1,000....	$0.32	$0.27	$0.22	$0.17	$0.11	$0.06	$0.04
2	1- 3,000....	0.65	0.54	0.44	0.33	0.23	0.12	0.07
3	3- 5,000....	1.30	1.09	0.88	0.67	0.46	0.25	0.14
4	5- 7,000....	1.95	1.63	1.32	1.00	0.68	0.37	0.21
5	7- 9,000....	2.60	2.18	1.75	1.33	0.91	0.49	0.28
6	9-11,000....	3.25	2.72	2.19	1.67	1.14	0.61	0.35
7	11-13,000....	3.90	3.26	2.63	2.00	1.37	0.74	0.42
8	13-15,000....	4.54	3.81	3.07	2.33	1.60	0.86	0.49
9	15-17,000....	5.19	4.35	3.51	2.67	1.82	0.98	0.56
10	17-19,000....	5.84	4.89	3.95	3.00	2.05	1.11	0.63
11	19-21,000....	6.49	5.44	4.39	3.33	2.28	1.23	0.70
12	21-23,000....	7.14	5.98	4.82	3.67	2.51	1.35	0.77
13	23-25,000....	7.79	6.53	5.26	4.00	2.74	1.47	0.84
14	25-27,000....	8.44	7.07	5.70	4.33	2.96	1.60	0.91
15	27-29,000....	9.09	7.61	6.14	4.67	3.19	1.72	0.98
16	29-31,000....	9.74	8.16	6.58	5.00	3.42	1.84	1.05
17	31-33,000....	10.39	8.70	7.02	5.33	3.65	1.96	1.12
18	33-35,000....	11.04	9.24	7.46	5.67	3.88	2.09	1.19
19	35-37,000....	11.69	9.79	7.89	6.00	4.10	2.21	1.26
20	37-39,000....	12.33	10.33	8.33	6.33	4.33	2.33	1.33
21	39-41,000....	12.98	10.88	8.77	6.67	4.56	2.46	1.40

§ 1036.3 *Earmarking.*—Each common carrier by railroad shall segregate in Account 716, Capital and Other Reserve Funds, and shall transfer from Account 798, retained Income, Unappropriated, to Account 797, Retained Income, Appropriated, an amount equal to the net credit balance resulting from any incentive per diem settlement involving boxcars subject to this part, and shall maintain separate accounts for funds received on Canadian owned boxcars. During any calendar year in which the carrier pays income taxes subject to a tax ruling governing incentive balances, the amount required to be earmarked by the carrier hereunder (or transferred by the Canadian carrier to its designee) shall be reduced by the applicable statutory percent, or by the percentage derived from dividing the income taxes in fact paid by the carrier by its net income, whichever percentage is less. The funds in such account shall be used to purchase or build new unequipped boxcars for general service or to rebuild general service, unequipped boxcars with code numbers and mechanical designations set forth in § 1036.1 for addition to such carrier's fleet in accordance with this part. The unexpended funds remaining in the accounts of the carriers may be invested in government bonds or other interest-bearing, temporary securities. The interest earned thereafter will bcome part of the earmarked fund.

§ 1036.4 *Use of funds.*—The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with § 1036.3, may be drawn down in whole or in part at any time by the carrier to build or purchase, in whole or in part, new unequipped boxcars for general service described in paragraph 1, *provided*, the carrier has in the same calendar year built or purchased its 1964-1968 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect. Similarly, earmarked funds may be used in whole or in part to rebuild any number or portion of general service unequipped boxcars described in paragraph 1, provided, the carrier has in the same

calendar year rebuilt its 1964-1968 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect. Net balances on Canadian owned cars may be drawn down once the designated carrier has built, rebuilt, or purchased its 1964-1968 averages as set forth above; but such drawdowns shall not affect the carrier's accumulation of arrearages resulting from prior failure to build, rebuild, or purchase its 1964-1968 averages. As used in this section, "build," "rebuild," or "purchase" refer to a commitment to build, rebuild, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment.

§ 1036.5 *Effective date.*—The rules set forth in sections 1036.1 and 1036.2 of this part shall be effective from September 1 of each year through February of the following year.

§ 1036.6 *Rules and regulations suspended.*—The operation of all rules and regulations, insofar as they conflict with the provisions of this part, is hereby suspended. The charges herein provided shall be paid for each day cars are held but nothing in this part shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.

(Interprets or applies Secs. 1 and 12 of the Interstate Commerce Act, 24 Stat. 379, 383, as amended, 49 U.S.C. 1, 12).

Title 49—Transportation

Chapter X—Interstate Commerce Commission

Subchapter A—General Rules and Regulations

Part 1036—Incentive Per Diem Charges on Boxcars

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 28th day of April 1970.

Ex Parte No. 252 (Sub-No. 1)

INCENTIVE PER DIEM CHARGES—1968

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report, and the interim report herein, are made a part hereof.

It is ordered, That chapter X of title 49 of the Code of Federal Regulations be, and it is hereby, amended by adding a new part 1036, Incentive Per Diem Charges on Boxcars, reading as set forth in appendix B to the report attached hereto.

It is further ordered, That the railroad respondents herein be, and they are hereby, notified and required to observe, enforce, and obey the rules and regulations concerning incentive per diem charges on boxcars, as set forth in appendix B to the report attached hereto.

It is further ordered, That the railroad respondents herein be, and they are hereby, notified and required (1) to observe, enforce, and obey any annual or special reporting requirement which shall be issued hereafter in or pursuant to this proceeding, and (2) to retain all incentive per diem reports made and received, including reclaims, and all incentive per diem discrepancy and adjustment reports.

It is further ordered, That the rules and regulations prescribed in appendix B to the said report shall be published in the Federal Register.

It is further ordered, That this order shall take effect on June 1, 1970.

And it is further ordered, That this order shall continue in full force and effect until the further order of the Commission.

APPENDIX C

Interstate Commerce Commission
Washington, D.C. 20423

Bureau of Accounts

In Reply Refer to: ACA-LFH

June 20, 1974

Mr. L. B. Rudloff, Controller
Illinois Terminal Railroad Company
710 N. 12th Boulevard
St. Louis, Missouri 63177

Dear Mr. Rudloff:

Your company's Form IPD for 1973 shows an amount of $673,958 deducted from incentive funds for income taxes applicable to the years 1970-1973, inclusive. Your annual reports show no income tax liability was incurred for the above years.

A member of your staff advised by telephone that the foregoing amount represents the deferred Federal income tax liability on the incentive per diem funds. Our accounting rules do not provide for deferred income taxes other than for that portion applicable to the investment tax credit. Also, under the incentive per diem rules, only taxes actually paid on the incentive per diem are deductible. Section 1036.3 provides ". . . the earmarked funds *shall be reduced by the amount of the additional income tax paid* (emphasis added) as the result of increasing taxable income by inclusion of the net incentive per diem earnings . . ." Any subsequent tax adjustments, either additional payments or refunds, should result in a proportionate adjustment of the earmarked funds at that time.

The incentive funds should be reimbursed from general corporate funds as soon as practicable for the amount of the income tax deductions. The Bureau should be advised when the reimbursement is completed. The monies transferred to the incentive fund should be disclosed in Form IPD. Any future deductions for income taxes from incentive per diem funds should be based on taxes paid.

Please confirm your understanding of the substance of this letter.

Very truly yours,

R. E. Hagen
R. E. Hagen, Chief
Section of Accounting

APPENDIX D

Interstate Commerce Commission
Washington, D.C. 20423

Bureau of Accounts

In Reply Refer to: ACA-LH

October 1, 1974

Mr. L. B. Rudloff, Controller
Illinois Terminal Railroad Company
710 N. 12th Boulevard
St. Louis, Missouri 63177

Dear Mr. Rudloff:

This refers to the matter of amounts deducted from your company's incentive per diem funds for income taxes, as discussed in our August 20, 1974, meeting.

You indicated that although your company incurred no income tax liability for the years concerned, amounts were deducted for Federal and State income taxes to compensate for the depletion of operating loss carryovers due to the inclusion of incentive per diem earnings in taxable income.

We have reviewed your position as outlined in the meeting and the supporting documents furnished us.

As you are aware, the rules specifically provide that the reduction of incentive funds for applicable income taxes is permissible only where income taxes are actually paid due to inclusion of incentive earnings in taxable income.

In the circumstances as previously advised reimbursement of the incentive funds for the income taxes deducted should be made from your general funds as soon as practicable with appropriate disclosure in Form IPD.

In the event your company starts paying income taxes in the future, it would then be appropriate to deduct amounts from the incentive funds to the extent that the taxes are increased because prior years' incentive per diem income has reduced operating loss carryovers which otherwise would be available to reduce such tax payments. This procedure would be consistent with the requirement that income tax deductions from incentive funds be based on taxes paid. Such reduction of the funds should be disclosed in Form IPD.

If further information is desired in this matter, please advise.

Very truly yours,

R. E. Hagen
R. E. Hagen, Chief
Section of Accounting

APPPENDIX E

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 10th day of February 1975.

Ex Parte No. 252 (Sub-No. 1)

Incentive Per Diem Charges, 1968

Upon consideration of the record in the above-entitled proceeding, including the petition filed December 19, 1974, by Illinois Terminal Railroad Company (Illinois Terminal) for modification of a ruling by the Bureau of Accounts, or, in the alternative for amendment of section 1036.3 of Title 49, Code of Federal Regulations; and

It appearing, that Illinois Terminal is a Class I line haul carrier of freight operating in the states of Illinois and Missouri; and that Illinois Terminal derives substantial amounts of its income from incentive per diem earnings pertaining to use of its boxcars by off-line railroads;

It further appearing, That the Illinois Terminal sustained substantial net losses during the years prior to the inception of incentive per diem in 1970, whereby it obtained income tax operating loss carryovers; that the Illinois Terminal utilized the loss carry-overs to offset future years' taxable income; that by such utilization the Illinois Terminal incurred no income tax liability for the years 1970 through 1973, but its operating loss carryovers were depleted due to the inclusion of incentive per diem earnings in taxable income;

It further appearing, That to compensate for the depletion of its loss carryovers, in 1973 the Illinois Terminal deducted an amount of approximately $673,958 from its earmarked incentive per diem funds, which amount represented the aggregate of the income taxes it would have paid due to taxable incentive per diem income for the years 1970 through 1973 were the operating loss carryovers not available;

It further appearing, That the Bureau of Accounts took exception to the Illinois Terminal's reduction of the funds for income taxes on the basis that no income taxes were paid for the years concerned, whereas the incentive per diem rules provide for such reduction of the funds only where income tax payments are made on the related incentive per diem earnings; that as set forth in section 1036.3 of Title 49, Code of Federal Regulations: ". . . The earmarked funds shall be reduced by the amount of the additional income tax paid as the result of increasing taxable income by inclusion of the net incentive per diem earnings . . ."; and that the Bureau of Accounts instructed the Illinois Terminal (1) to reimburse its incentive per diem funds for the taxes deducted, and (2) that in the event it starts paying income taxes in the future, it would then be appropriate to deduct amounts from the incentive per diem funds to the extent that the taxes are increased because prior years' incentive per diem income has reduced operating loss carryovers which otherwise would be available to reduce such tax payments;

It further appearing, That the Illinois Terminal's petition requests the Commission to either (1) reverse the Bureau of Accounts' ruling and to reinstate the deduction of $673,958, or (2) find that such deduction was authorized and revise the regulations to provide for reduction of incentive per diem funds where related earnings created taxable income and income taxes would otherwise be payable on incentive per diem earnings were it not for available operating loss carryovers to offset this taxable income; that the Illinois Terminal alleges that (1) the amount

deducted for income taxes was consistent with the intent of the rules to provide for reduction of the incentive funds where the related earnings contribute to taxable income, notwithstanding nonpayment of any income taxes because of offsetting loss carryovers, (2) the deduction for income taxes was consistent with the intent of the Commission that a carrier should not be adversely affected because of incentive per diem earned, and (3) its situation is unique, and the denial of its petition would deprive it of assets needed for future operations and normal boxcar requirements which must be satisfied before incentive per diem funds can be used to acquire additional boxcars;

And it further appearing, That the Illinois Terminal's reduction of the incentive per diem funds for income taxes was contrary to section 1036.3, as no payable tax liability was incurred; that the amounts deducted for income taxes thus were made available for general corporate purposes, which is inconsistent with the aim of the Commission's incentive per diem program; that in these circumstances the funds deducted cannot be considered a part of the Illinois Terminal's general cash fund and should not be used for operational purposes or to meet normal boxcar needs; that the Illinois Terminal's situation with respect to depletion of its loss carryovers by incentive per diem income is not unique, but would apply equally to other similarly situated carriers.

It is ordered, That the petition be, and it is hereby, denied.

By the Commission, Division 2.

ROBERT L. OSWALD
Secretary

(Seal)

APPENDIX F

Interstate Commerce Commission

Ex Parte No. 252 (Sub-No. 1)

INCENTIVE PER DIEM CHARGES—1968

Decided March 31, 1975

On exceptions, regulations governing incentive per diem charges pursuant to section 1(14)(a) of the Interstate Commerce Act, as prescribed in 337 I.C.C. 183, 337 I.C.C. 217, 339 I.C.C. 627, and 343 I.C.C. 49, further modified.

Report of the Commission on Exceptions

O'Neal, *Vice Chairman:*

Various petitions for reconsideration, for reopening, for modification, for suspension or recision of the outstanding orders, replies, and statements of position supporting or opposing these petitions were filed and as a result the Commission by order of April 24, 1973, reopened this proceeding for reconsideration of certain issues raised by these pleadings which are: (1) to determine whether the funds now earmarked for boxcars should be permitted to be drawn down for the acquisition of other types of cars in demand, like covered hoppers, and whether such modification would increase the number of boxcars available for general use, (2) to determine whether the existing test period average should be modified in any respect, (3) to determine whether a specified period should be prescribed within which incentive funds must be expended or committed to the acquisition of general service boxcars, (4) to determine whether

carriers which fail to acquire their normal complement of such cars, and, consequently, are unable to draw down the incentive funds within a specified period, should be required to return the funds collected to the debtor carriers, (5) to determine other methods to facilitate the use of the accrued incentive per diem funds for the purchase, building or rebuilding of general service, unequipped boxcars, and (6) to determine whether any group of carriers should be exempt from the payment of incentive per diem.

Upon consideration of these six issues, based on an oral hearing and numerous verified statements, replies, and briefs, an initial decision was rendered by Administrative Law Judge Forest Gordon on July 23, 1974, recommending certain changes in the regulations governing incentive per diem. Exceptions[1] and replies[2] have been filed, and they are discussed in detail

[1] The Soo Line Railroad Company; the Kansas City Railway Company; the Long Island Rail Road Company; R.D. Timpany, trustee, Central Railroad Company of New Jersey, the Chicago Rock Island and Pacific Railroad Company; the Atchison, Topeka and Santa Fe Railway Company; the Chessie System Lines; Robert W. Blanchette, Richard C. Bond and John H. McArthur, trustees of the Property of the Penn Central Transportation Company; Robert W. Meserve and Benjamin H. Lacy, trustees of the Property of the Boston and Maine Corporation; the Louisville and Nashville Railroad Company; the Department of Transportation; General Mills, Inc.; the Western Pacific Railroad Company; the Seaboard Coast Line Railroad Company; the Chicago and North Western Transportation Company; the Grocery Manufacturers of America, Inc.; the Illinois Central Gulf Railroad Company; Burlington Northern, Inc.; Central Vermont Railway and Duluth, Winnipeg and Pacific Railway; the Union Pacific Railroad Company; the Southern Railway Company; the Florida East Coast Railway Company; the New York, Susquehanna and Western Railroad Company; and Thomas F. Patton and Ralph S. Tyler, Jr., trustees of the property of the Erie Lackawanna Railway Company.

[2] Robert W. Blanchette, Richard C. Bond and John H. McArthur, trustees of the Property of the Penn Central Transportation Company; the Chicago, Rock Island and Pacific Railroad Company; the Norfolk and Western Railway Company; the Atchison, Topeka and Santa Fe Railway Company; the Union Pacific Railroad Company; the Florida East Coast Railway Company; the Bureau of Enforcement of the Interstate Commerce Commission; Burlington Northern, Inc.; the Central Vermont Railway; the National Industrial Traffic League; and the Soo Line Railroad Company.

in connection with each issue hereinafter. The Administrative Law Judge's statement of the background of this proceeding is set forth in appendix A. We adopt his opening remarks and discussion of shipper testimony found on pages 4-12 of the initial decision and will repeat it only to the extent necessary to address the exceptions.

Some of the parties have filed a number of exceptions to the opening remarks and discussion of shipper testimony in the initial decision. We find these exceptions taken as a whole to be without merit since they deal with minor factual discrepancies that have no bearing on the six issues. Some of them, however, require discussion. Exception was taken to the statement:

> Further action was taken by the Commission when it increased basic per diem charges. This was designed to discourage carriers having an insufficient number of boxcars to cover loadings from withholding foreign boxcars for this purpose. p. 5

Basic per diem charges are considered a fair return on investment for owning railroads; they are not designed to discourage a carrier from holding foreign boxcars. One of the purposes of the incentive per diem program, besides providing funds for the acquisition of cars found to be in short supply, was to encourage the prompt return of existing cars.

We also note that not all shipper testimony was favorable toward the incentive per diem program. The National Council of Farmer Cooperatives supported the proposal to return unspent incentive per diem funds to the debtor roads.

The Burlington Northern excepts to any of the interpretations of the initial decision which restrict or limit expenditures of in-

centive per diem funds. Such restrictions, it alleges, lack statutory authorization, are contrary to the legislative intent of section 1(14)(a) of the act, and amount to a direct confiscation of property. We find this exception to be without merit since the language of section 1(14)(a) is quite clear: "The Commission may * * * establish reasonable rules, regulations, * * *" for the incentive per diem program. The Burlington Northern has not submitted any evidence to show why the limitations on the expenditures of incentive funds are unreasonable. The limitations do not amount to a confiscation of property. These rules only insure that the funds be put to their intended use.

Three of the parties argue that the Administrative Law Judge erred in finding that the initial decision was not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969. Two of these exceptions present no evidence to support this contention and are thus without merit. General Mills does, however, submit evidence to support its argument. It alleges, as it did before the Administrative Law Judge, that XF food quality boxcars should be made the subject of the payment of incentive per diem. The XM boxcar, it alleges, is not an adequate substitute for the XF car in transporting foodstuffs for human consumption since shippers of these food products are increasingly using chemical pesticides to prevent contamination. The Administrative Law Judge, although sympathetic to the problem, did not grant General Mills the relief it sought stating that it was outside the scope of the six specific issues and would promote the assignment of boxcars to one shipper as opposed to the general shipping public. Subsequent to the issuance of the initial decision, the Commission instituted a rulemaking proceeding, Ex Parte No. 252 (Sub-No. 1), Incentive Per Diem Charges—1968 (XF Cars), to determine whether incentive per diem should be applied to XF boxcars. That, we believe, is the proper forum for General Mills to argue the issues it has raised.

Also, certain other relief has been sought. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road) filed a motion to strike from page 10 of the Penn Central's reply to exceptions the following statement: "* * * in the latter case [that of Milwaukee Road] IPD funds admittedly had been used for general operating expenses." The record shows that the Milwaukee Road's incentive per diem funds were placed in its cash accounts and that the incentive funds were "in reality added to the general working capital of the Milwaukee Railroad". (Tr. 160). The record also shows, however, that none of the incentive funds were spent as of the date of the hearing. (Tr. 159). The motion to strike is granted. The Rock Island requests that "the exceptions of the Western Pacific should be stricken because of the assertions of the fact not substantiated in the record in this proceeding." Nothing further is submitted to support this broad request and it is therefore denied. Finally, the Illinois Terminal Railroad Company filed a petition requesting that the subject matter of this proceeding be handled by the entire Commission. Since the matter is before the Commission, no action on the petition is necessary.

Discussion

We will now proceed to discuss the six issues in light of the exceptions.

Issue number 1.—The issue is as follows:

> To determine whether the funds now earmarked for boxcars should be permitted to be drawn down for the acquisition of other types of cars in demand, like covered hoppers, and whether such modification would increase the number of boxcars available for general use.

This issue deals with two sections of Title 49 of the Code of Federal Regulations, 1036.1 and 1036.4. Section 1036.1 states in pertinent part:

Each common carrier by railroad subject to the Interstate Commerce Act shall pay to the owning railroads, including the owning railroads of Canada the additional per diem charges * * * on all boxcars shown below.

Mechanical designation

XM B100-109, B200-209, B300-309

XMI B110-119, B210-219, B310-319

XMIH B120-129, B220-229, B320-329

VA B040

VM B050

XC B060

XCI B070

XV B080

Section 1036.4 states in pertinent part:

> The net credit balances resulting from incentive per diem settlements, * * * may be drawn down in whole or in part at any time by the carrier to build or purchase, in whole or in part, new, unequipped boxcars for general service * * *

The Administrative Law Judge concluded that incentive per diem funds should not be drawn down for the acquisition of cars other than unequipped general services boxcars (hereinafter boxcars), and expressed doubt that such modification would increase or improve the national car supply. He gave five reasons to support his conclusion, namely that the benefits of incentive per diem applied to the purchase of additional covered hoppers would not be of much advantage to shippers outside the grain industry; that section 1(14)(a) of the act prohibits the Commission from expending IPD for "any type of freight car" in adequate supply, and, therefore the Commission

would have to find covered hoppers in short supply before IPD could be prescribed; that if the Commission should permit the purchase of covered hopper with IPD funds, there is no assurance that the purchase of covered hoppers would actually be in addition to those that have been purchased had IPD funds not been available; that it was questionable whether the purchase of covered hopper would increase or improve the national car supply, since the loading of covered hoppers is controlled by the owners of the cars and these cars are usually required to be returned empty to the owners; and that there has not been shown a complete interchangeability between the boxcar and any other type of car.

On exceptions, the creditor railroads and the Department of Transportation disagreed with each of these reasons. Regarding the first reason, it is argued that it would in fact be beneficial outside the grain industry to extend the incentive per diem program because the availability of covered hoppers would free boxcars from grain service and, therefore, would make boxcars available to transport other commodities.

As to the second reason, it is accepted that the statute requires that incentive per diem be only prescribed on a car that is found to be in short supply. However, it is alleged that although covered hoppers have not been so found, it does not follow that there is an adequate supply of covered hoppers. It is suggested that an immediate investigation be undertaken by the Commission to identify all types of cars found to be in short supply. Furthermore, it is argued that the Administrative Law Judge misconstrued section 1(14)(a) of the act by equating prescription of incentive per diem on covered hoppers with the use of incentive funds to purchase covered hoppers. It is contended that under section 1(14)(a) of the act, a finding of "short supply" is a precondition to the application and collection of incentive per diem, while the manner in which actual collected incentive funds are to be spent is left to the discre-

tion of the carrier unless restricted by Commission rule or regulation. Boxcar "earmarking" is such a rule but could be changed.

It is further alleged that the initial decision failed to give consideration to the covered hopper shortages. Evidence of record showed that shortages of covered hoppers relative to the size of the hopper fleet were more severe than shortages of boxcars relative to the size of the boxcar fleet. The covered hopper fleet is less than 10 percent of the boxcar fleet. Moreover, it is alleged that covered hoppers are being increasingly substituted for boxcars in the carrying of the largest volume commodity groups, thus freeing boxcars for other purposes. Exceptants point to the testimony of a witness for the Commission's Bureau of Economics, to the effect that "it was shown that there has been a substantial substitution of certain types of car for the plain boxcar. The principal substitute has been the covered hopper for field crops, grain mill products, and industrial inorganic and organic chemicals."

Attacking the conclusion that there is no assurance that the purchase of covered hoppers with incentive funds would be in addition to those that would have been purchased without incentive per diem, exceptants maintain that the Commission imposed regulations governing the expenditure of incentive funds for boxcars and can do the same for covered hoppers.

In connection with the fourth reason, it is submitted that the initial decision wrongly implied that covered hoppers are used less efficiently than boxcars. The Department of Transportation, in its exceptions, states that covered hoppers tend to be more intensively utilized. Furthermore, if control over loading of covered hoppers became a problem and was shown to be contrary to the public interest, the Commission has the authority to order corrective measures by utilizing its general services rules.

Lastly, exceptants minimize the weight given to claim that there is a lack of complete interchangeability between the boxcar and any other car. They argue that incentive per diem funds should be available for acquiring the type of equipment which will relieve any pressures on the plain boxcar fleet. It is asserted that the question of whether or not covered hoppers and boxcars are interchangeable is irrelevant because the record shows that additional covered hoppers will free up boxcars for uses other than grain. Since covered hoppers have superior capacity for handling certain traffic that now moves in boxcars, it would promote efficiency to make existing funds partially available for investment in covered hoppers rather than for investment boxcars alone. Furthermore, it is pointed out that in its 1967 decision, Ex Parte No. 252, *Incentive Per Diem Charges*, 332 I.C.C. 11, 15, the Commission recognized the importance of covered hopper cars and their relationship to boxcars, as follows:

> • • • In recent years many innovations and improvements have taken place in car design and operation. In the transportation of many commodities the standard boxcar has been replaced by cars capable of transporting greater loads with substantially less damage. In the transportation of grains, railroads are converting more and more to the use of large covered hopper cars. Shippers of lumber and plywood have found modern cars designed to facilitate transportation of their products increasingly desirable. At the same time, many of these cars are adaptable to the transportation of other commodities when not needed in the particular trade for which they were designed. In large part, the special service boxcars, covered hoppers and flat cars of various types handle traffic which formerly moved in general service boxcars. • • •

Furthermore, it is argued that in Ex Parte No. 241, *Investigation of Adequacy of Freight Car Ownership*, 346 I.C.C. 497, the Commission found that shortages of covered hoppers, as well as boxcars, existed.

Finally, the Grocery Manufacturers of America, Inc., and General Mills argue that money obtained through incentive per diem should be permitted to be invested in "XF" boxcars, used exclusively to transport food products. Any discussion of this contention is inappropriate here.[3]

In reply to exceptions, the debtor lines urge that it would be unfair and competitively disadvantageous to them to allow creditor lines to augment their fleets with any type of equipment other than ordinary boxcars. It is also argued that carriers do not need any incentive to purchase covered hoppers, which are special equipment and are being acquired at an increased rate. Furthermore, the acquisition of covered hoppers, used mainly in the grain trade, may not have much effect in freeing boxcars for general use. Accordingly, use of incentive funds for other than boxcar acquisition would prolong the boxcar shortage.

Conclusion.—We agree with the result reached by the Administrative Law Judge. Based on section 1(14)(a) of the act there must be a finding that the supply of a car is inadequate before incentive per diem can be earned on that car, such a finding has been made regarding boxcars only. Additionally, the rules found in sections 1036.3 and 1036.4 of Subchapter A, Chapter X, Title 49 of the Code of Federal Regulations require that incentive per diem funds earned on the boxcar must be drawn on that type of car.

One of the main purposes of the incentive per diem program is "to make acquisition of new cars financially attractive to railroads". *United States v. Florida East Coast R. Co.*, 410 U.S. 224, 233 (1973). The record shows that during the period 1955-1972, the number of covered hoppers more than tripled

[3] On August 23, 1974, a rulemaking proceeding was instituted by the Commission to determine whether incentive per diem should be applied to XF boxcars. Ex Parte No. 252 (Sub-No. 1). Incentive Per Diem Charges—1968 (XF Cars).

and the aggregate capacity of the covered hopper more than quadrupled. On the other hand, from 1968 (when reporting of the number of general service, unequipped boxcars began) to 1972, the number of boxcars declined 18 percent. The record also shows that covered hoppers are being acquired at an accelerated pace. Thus, we believe that carriers need no further incentive to spur their acquisition of covered hoppers.

We also think it is clear on this record that the main benefit from investing incentive per diem funds in an expanded covered hopper fleet would accrue to the grain shippers. This is contrary to the broader basis specified in section 1(14)(a) of the act for imposition of incentive per diem, namely consideration of "factors affecting the adequacy of the national freight car supply". Therefore, we believe that incentive funds should only be used for purchase of plain boxcars, in order to benefit shippers generally and not a particular segment of the shipping public.

However, we are amenable to an expansion of the incentive per diem program to cars other than general service boxcars if: (1) a record is made showing the car to be in short supply, (2) a record is made showing a reluctance to expeditiously release the car by the terminating or delivering railroad, (3) a record is made demonstrating that additional incentive to purchase the car is needed, and (4) a record is made showing such an extension of the incentive per diem program to be of general benefit.[4]

Issue number 2.—This issue is as follows:

> To determine whether the existing test period average should be modified in any respect.

The test period average requirement is set forth in section 1036.4 of the regulations which provides that:

[4] See Ex Parte No. 252 (Sub-No. 2), Incentive Per Diem Charges—Gondolas, instituted February 11, 1975.

> The net credit balances resulting from incentive per diem settlements * * * may be drawn down * * * provided, the carrier has * * * built or purchased its 1964-68 average number of such boxcars and made up any arrearages in having failed to maintain such average each year this order is in effect.

This regulation was adopted "to insure not only that the incentive charges are used for the purpose intended (and hence "earmarked"), but also that the incentive program stems the present downtrend in the national supply of plain boxcars," as stated in 337 I.C.C. 217, 228. Therefore, the creditor railroad beneficiary of net incentive per diem credit balances is required to expend those balances only for the building, purchasing, or rebuilding of boxcars beyond its normal annual expenditures for such purposes. To determine what are the normal annual expenditures, a representative 5-year period of 1964 through 1968 was used. On this basis a so-called test period average of cars purchased, built, or rebuilt by each carrier was computed. This average number of cars in any given year, plus any arrearages in failing to purchase, build, or rebuild the average in prior years, must be purchased, built, or rebuilt out of general operating funds under the regulations before a carrier may expend net incentive per diem credit balances for these same purposes.

The Administrative Law Judge stated that the test period average in some instances actually tended to restrict the expenditure of net credit balances, instead of assuring that they would be spent to expand the boxcar fleet. For example, during the 5-year test period, the Union Pacific, a major net creditor railroad in connection with incentive per diem payments, purchased 9,275 boxcars, for an annual average purchase of 1,855 boxcars. The 9,275 cars amounts to 29.6 percent of the total number of cars built by all railroads in that period, which means that the Union Pacific would have to buy 29.6 percent of the

nationwide total requirement of new cars from general funds before it could spend its net incentive per diem revenues despite the fact that 1972 data showed that it had only 7.48 percent of the Nation's trackage, 4.38 percent of the car fleet, 5.74 percent of the gross operating revenues, 3.31 percent of the car loadings, and operated only 6.57 percent of the ton miles. The annual cost of purchasing its test period average would be $33 million and in view of its failure to purchase enough cars in any year since the regulations become effective to meet the test period average, it is $80 million in arrears. Therefore, because of this problem, the Administrative Law Judge concluded on pages 14 and 15 of his initial decision that:

> (F)or one reason or another [the test period average] has not served its purpose. A large amount of collected IPD funds remains unspent and uncommitted * * * It is obvious that some changes have to be made in the present test period if the benefits derived from the IPD program are to be more fully realized.

After considering a number of changes in the requirement as proposed by the creditor railroads, he decided that a modification of the test period average of this requirement was warranted, which is as follows:

> Therefore, I am proposing that the test period average be open to modification upon application by any carrier to which the present entry requirement is an insuperable obstacle. Upon the showing of good cause why any creditor railroad is unable to put its collected IPD funds to use the Commission should modify the test period for the applicant carrier. Such modification, however, should at a minimum require the matching of funds to be expended by corporate funds. The Commission should take into account the financial condition of the applicant carrier, the burden of complying with the prescribed test period

average and the number of retirements the applicant made in the proceeding year that relief is being applied for.

As a result, the Administrative Law Judge would modify section 1036.4 to read:

> However, upon application and the showing of good cause why any carrier is unable to draw down in whole or in part the net credit balance resulting from incentive per diem settlements * * * the Commission may, in its discretion, modify the above requirements so as to grant relief to the applicant to such extent, and for such time, and in such manner as, in its judgment, is consistent with the public interest and the national transportation policy.

On exceptions, two main objections are made by both debtor and creditor railroads to the proposed modification of the test period average requirement. The modification is characterized on the one hand as too broad and vague and on the other hand as overly stringent. Different modifications of the regulations are proposed. For example, certain debtor railroads argue that the Administrative Law Judge's disposition of this issue actually weakens the test period average requirement and will lead to misuse of incentive per diem net credit balances in the future. Consequently, they urge that stricter standards should be established for permitting any deviation from a carrier's test period average. What constitutes "good cause" and "insuperable burden" must be clarified. In addition, since unspent incentive per diem net credit balances are in the nature of a trust fund, in order to insure due process, the regulations should provide for notice to the parties to this proceeding upon application by any creditor railroad for authority to deviate from the test period average.

The Southern Railway and the Union Pacific, major creditor railroads, urge that different modifications be made in the regulations. Southern alleges that the test period average requirement is the greatest barrier to the success of the incentive per diem program and that most of the other issues would become inconsequential if the test period average requirement is properly modified. The proper modification, according to Southern, is simply to require that a carrier replace its retirement of boxcars out of its general funds before drawing down incentive per diem funds for additional car acquisitions. Southern also suggests certain refinements in its proposal involving, for example, the establishment of an average annual retirement quota as a method of determing what replacements must be made out of general funds before incentive per diem funds can be drawn down.

The Union Pacific proposes the establishment of an optional alternative test period, 1969-1972, for averaging purposes which would produce an alternative annual test period average of 643 cars as opposed to Union Pacific's current test period average of 1,855 cars. Union Pacific objects to the Administrative Law Judge's modification because, among other things, it fails to provide some flexibility in matching expenditure of general funds and incentive per diem funds and is overly stringent by requiring that any modification of the test period average must take into consideration such factors as the number of retirements of cars by and the financial condition of, the carrier seeking such modification.

Generally, the Department of Transportation, the Commission's Bureau of Enforcement, and the National Industrial Traffic League support the modification by the Administrative Law Judge.

Conclusion.—We agree with the Administrative Law Judge and the parties hereto that the test period average has not completely served its purpose. It appears to be the most significant obstacle preventing the incentive per diem program from being fully successful. However, we believe that the modification, with certain changes, made by the Administrative Law Judge is the

proper resolution of this problem because contrary to the allegations on exceptions, it does provide flexibility in considering, and possibly modifying, the test period average in individual cases.

The opposition to the modification of the Administrative Law Judge is based in part on opposition to the so-called "insuperable obstacle" test which is alleged on the one hand to be too vague and on the other hand to be overly stringent. This objection, however, is misplaced because although the Administrative Law Judge discussed the possibility of including an "insuperable obstacle" provision in his modification of the regulation, his modification does *not* in fact include such provision. The basic requirement for modification is a showing of "good cause," as follows: "upon application and the showing of good cause * * * the Commission may, in its discretion, modify the above requirements * * *."

The "good cause" provision is also opposed as having too many restrictive qualifications. However, again, although the Administrative Law Judge discussed certain criteria which he believed should be considered in determining whether "good cause" has been shown for modifying a carrier's test period average, he did *not* include these criteria in his modifications of the regulations. Moreover, these criteria are not all inclusive and are proper factors to be weighed by the Commission in determining "good cause."

The proposals by Southern Railway and Union Pacific on exceptions are deficient in that, unlike the modification of the Administrative Law Judge, the Southern Railway's modification does not assure that net incentive per diem credit balances will be spent to expand the boxcar fleet. Instead, these proposals could result in the mere partial replacement of car retirements. The Union Pacific's modification suffers from the same malady as the unmodified test period arrearage because of its inflexibility.

The only exception to this issue which in, in our opinion, has any merit is the one which points out that the Administrative Law Judge did not include in his modification a provision for notice to the parties when a carrier files an application for modification of its test period average. We believe that a provision for notice should be included because the Commission's decisions in these matters will be discretionary, based on a flexible standard of "good cause." Thus pertinent evidence in support of or in opposition of the application for modification will be necessary to reaching a proper determination.

Finally, we believe that one element of the proposal for modification of the test period average requirement discussed by the Administrative Law Judge but omitted in the initial decision should be adopted. That is a requirement that incentive per diem expenditures be matched by corporate fund expenditures. He states on page 15 of the initial decision that "Such modification, however, should at a minimum require the matching of funds to be expended by corporate funds."

Therefore, the prescribed amendment to the regulations, modifying the test period average requirement, will, in addition to the modification proposed by the Administrative Law Judge, include a provision for adequate notice to the parties to this proceeding when an application for modification is filed, and a provision that in connection with any modification of the test period average the carrier is still required to spend at least an equal amount from its general funds as it spends from its net credit balance of incentive per diem funds.

Issue number 3.—This issue is as follows:

> To determine whether a specified period should be prescribed within which incentive funds must be expended or committed to the acquisition of general service boxcars.

The regulations do not require that incentive funds be expended within a specified period, and the most relevant part

of the regulations is in section 1036.4, which provides as follows:

> As used in this section, "build," "rebuild," or "purchase" refer to a commitment to build, rebuild, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment, except that in extraordinary cases beyond the control of the carrier or the car supplier, a car that is delivered after 10 months from the date of the commitment may qualify if approved by the Bureau of Accounts of this Commission.

As mentioned, there is no specified period in the regulations in which funds must be spent. The Administrative Law Judge stated that without stronger compulsion than is provided by the current regulations, certain railroads apparently will not spend incentive per diem funds that they have collected. Therefore, he concluded that such compulsion should be provided by requiring that they spend such funds within a specified period. He considered specified periods ranging from 1 to 5 years and finally decided that 2 years is a reasonable period for expenditure of the funds. He further required that the 2-year period should run from the date on which the order in this reopened proceeding becomes effective. Other conditions which he imposed were to permit carriers to obtain relief from the 2-year expenditure period if they could show good reason; and to require surrender of the funds to the Commission, if the railroads fail without cause to use the collected funds within the designated time period. The Commission would, thereafter, administer the disposition of the funds, after consulting with the Association of American Railroads. His specific amendment to section 1036.4 would add the following provision:

> Any carrier who has not obtained relief and failed to put to use earmarked funds within 2 years of collection for the building, rebuilding, leasing, or purchasing general unequipped boxcars described in paragraph 1 for addition to

> such carrier's or designee's fleet in accordance with this part, will be required to surrender such funds to the Interstate Commerce Commission. The Commission, after consultation with the Association of American Railroads, shall arrange for the use of surrendered funds for the purpose of adding to the national fleet of general service unequipped boxcars described in paragraph 1.

The addition of the above amendment did not change the provision regarding the acquisition of a car on line within 10 months from the date of commitment to purchase.

The exceptions are directed mainly to the Administrative Law Judge's requirement to spend incentive funds within 2 years, his requirement to surrender unspent funds to the Commission, and to the actual wording of the Administrative Law Judge's amendment to section 1036.4.

It is argued by the creditor carriers that no deadline should be imposed on the expenditure of funds. They contend that the 2-year limitation is impractical; the car builders are booked to capacity and have backlogs; that carriers who need relief from the test period average may, as a result, also need relief from the 2-year expenditure requirement; that this provision is not as flexible as the one regarding the test period average, since it ignores the possibility that exceptional circumstances may compel a carrier to defer incentive purchase beyond 2 years; that the limitation is an infringement on managerial discretion; that the need for a specified expenditure period has been caused by the lack of flexibility in the incentive per diem program; and that there would be no need for the restriction if carriers were permitted to expend incentive funds to purchase covered hoppers or to assist in financing the national boxcar pool. Two of the debtor carriers urge on exceptions that a 1-year time limit be imposed for purchasing boxcars, and that, in the event the funds are not spent within a year, they should be returned to the debtor carrier from which they were collected.

The Administrative Law Judge's proposal that unspent incentive per diem funds be surrendered to the Commission was strongly opposed. The parties generally argued that section 1(14)(a) of the act does not nor does any other statute authorize the surrender of funds to the Commission.

The legislative history of section 1(14)(a) shows that Congress did not intend to give the Commission such authority. It is argued that the surrender of funds is a violation of the Fifth Amendment of the Constitution, since it would constitute confiscation of property without due process of law. Furthermore, it is asserted by the parties that they have been denied procedural due process in this regard, since they were not given adequate notice of the finding they are being required to meet; the Federal Register Notice setting forth issue number 3 does not mention the surrender of funds; and the only issue that raises a matter of return of incentive funds is issue number 4, which refers to the return of unspent funds to debtor carriers and not to the Commission. At any rate, it is contended that the proposed forfeiture of funds would have no practical effect since the Administrative Law Judge's proposal does not state exactly how the surrendered funds would be spent for the purchase of new boxcars. Finally, some of the parties opposing the surrender of funds to the Commission have indicated that they would not oppose surrendering unspent funds to Rail Box.

The parties also raise a number of objections to the wording of the amendment to section 1036.4. They argue that the amended sections does not reflect the Administrative Law Judge's stated intent to have the 2-year period operate prospectively. In other words he stated in his discussion of this issue that the 2-year rule would become effective on the date upon which the final order of the Commission becomes effective, but this is not included in the actual amendment. The wording in the amendment of "within 2 years of collection" is termed impractical because determination of net credit balances of incentive per diem funds, and, thus, the earmarking of those funds, occurs at the end of the calendar year. Accordingly, a carrier would have to commit within 2 years funds collected in January without knowing until the end of the year if it would have a net credit balance to pay for the commitment. The 2-year limitation would then become essentially a 1-year limitation for funds collected in January. It is also maintained that section 1036.4 does not set out the circumstances and conditions for the Commission's administration of the surrendered funds. And, finally, some parties criticize the present requirement of section 1036.4 that a car be on line ready for use within 10 months from the date of commitment to purchase. It is asserted that the 10-month period is too short in the face of backlogs which are being experienced by car builders.

Supporters of the position taken by Administrative Law Judge argue that his proposal to require surrender of unspent funds to the Commission does not violate a constitutionally protected property right of creditor carriers to collected incentive per diem funds. Incentive per diem they contend is a creative of statute and under section 1(14)(a). The Commission can prescribe reasonable rules and regulations including requiring the surrender of unspent funds. Some of these parties also agree that Rail Box could be the proper repository of surrendered unspent funds.

Conclusion.—We agree with and affirm the Administrative Law Judge's imposition of a time requirement for spending incentive per diem credit balances. The purpose of incentive per diem is to acquire boxcars and the accumulation of incentive funds in no way accomplishes this purpose. On exceptions, it was alleged that this time period was inflexible and impractical. The Administrative Law Judge recognized this problem and concluded on page 17 of his decision that "if any of the carriers can provide good reason for non-compliance with the prescribed 2-year period, applications for relief may be made to

the Commission." This conclusion was not, however, included in his amendment of the regulation. Our prescribed amendment herein to section 1036.4 will include this provision.

We believe that the proposal for a 1-year expenditure requirement made by some of the debtor carriers is not long enough and that the proposal to return unspent funds to the debtor carriers is also without merit for reasons hereinafter discussed in connection with issue number 4.

We do not agree, however, with the Administrative Law Judge's requirement that incentive per diem funds which are not spent within 2 years must be surrendered to the Commission. Although, incentive per diem funds are required to be earmarked and separated from the general funds of the carrier and have some of the characteristics of a trust fund as discussed in prior Commission reports, they are nevertheless "just and reasonable compensation to freight car owners." As an alternative to the Administrative Law Judge's proposal we will permit those funds to be voluntarily surrendered to Rail Box as was suggested by some of the parties. The rules will be modified to allow for this voluntary surrender. We will not, however, require surrender of the funds to the Commission in the event they are not timely spent, nor voluntarily surrendered to Rail Box but, failure to comply will nevertheless, subject the violator to investigation by the Commission, as hereinafter prescribed.

To insure easy compliance with the requirements of this regulation and to readily identify incentive per diem funds spent, to be spent, unspent or available for surrender to Rail Box, we will require the use of funded accounting by the carriers.

Funded accounting requires that cash and/or other assets be segregated and their use restricted for specific purposes. While current regulations require that incentive per diem charges shall

be earmarked or segregated for use in acquisition of unequipped general purpose boxcars there is now no requirement for segregation of the funds in a separate bank account. Consequently, carriers may now include the monies in their general cash account to be used for any purpose provided the general cash account balance does not fall below the amount of incentive funds collected and not expended.

The use of funded accounting is a beneficial practice. It provides ready identification of the monies and their use. It encourages the use of funds for the purpose provided and does not permit delays in accomplishing the intent of the program by diversion of the funds for other purposes even on a temporary basis.

We will require segregation of incentive per diem funds to be accomplished by ordering that monies included in the fund be deposited in a special bank account. We do not object to temporary investment of unexpended funds in Government bonds or other liquid securities. However, such securities should be readily convertible to cash so that funds remain available for boxcar purchases. Interest earned should become part of the earmarked fund. Any questions concerning investment of incentive per diem funds should be directed to the Commission. Each affected carrier shall arrange for immediate transfer of incentive per diem funds now on deposit in the general corporation bank account to a separate bank account.

Finally, in connection with the argument about when the 2-year expenditure period becomes effective, none of the requirements prescribed herein will take affect until this report and order becomes effective. Any incentive per diem payments collected thereafter, resulting in a credit balance for a carrier, must be spent within 18 months from the end of the year of collection. This is an equitable compromise amounting to an extension of 6 months, thereby allowing the railroads enough

time to plan for and spend any net credit balance while insuring that those funds will be spent within a reasonable period of time. Therefore, to clarify the amendment by the Administrative Law Judge, we will prescribe a modification of his wording of "within 2 years of collection" to state "within 18 months after the end of the calendar year in which the funds are collected and result in a net credit balance." We do not find any merit to the contention that the present regulations should be modified in regard to the 10-month period for acquisition of a car on line from the date of commitment. There is already a provision, which we find to be sufficient, that a carrier can gain relief for a car delivered after 10 months in extraordinary cases beyond the control of the carrier or the car supplier if approved by the Commission's Bureau of Accounts.

Issue number 4.—This issue is as follows:

> Whether carriers which fail to acquire their normal complement of such cars and, consequently, are unable to draw down the incentive funds within a specified period, should be required to return the funds collected to the debtor carriers.

In his initial decision, the Administrative Law Judge concluded that funds held by creditor railroads should not be returned to debtor railroads for repairs and maintenance, stating that it would be contrary to the purposes of incentive per diem and contrary to the intent of Congress in amending section of 1(14)(a) of the act. His underlying reasons for this conclusions were that there is little likelihood that the debtors could accept refunds, if spending the refunds also required matching expenditure from their general funds as is required of the creditor railroads, and that "the mechanics of returning unspent earmarked funds would be an administrative nightmare." He stated in regards to this latter problem at page 18:

While one road may be a debtor to another road, the same debtor road could be a creditor to a third road. The Penn Central suggests that this problem could easily be overcome if the unspent funds of a creditor road were to be transferred on a prorata basis back to the net debit line which actually contributed to the unexpended fund of the creditor line. This proposal, however, fails to deal with the problem of partially spent funds, nor does it take into account the time dimensions of the problems. As for example, if creditor railroad A has spent or committed all of its incentive funds in year 1 and 2 but none in year 3, would it return funds on a pro-rata basis to its debtors in year 3 or on a pro-rata basis to all of its debtors in years 1, 2 and 3? For the above reasons the proposal to return funds that have not been drawn down by creditors within a specified period must be denied.

On exceptions, the debtor railroads in support of refunding unspent incentive per diem payments argue that these funds are trust funds and not general funds vested in creditor railroads; that if such funds are not used to improve the nationwide car supply they should be refunded to the debtor railroads from whom the payments were collected; that a 2-year period is a reasonable time for the creditor railroads to spend the incentive per diem funds, and if they fail to do so they should be required to refund the payments; that refunding on a pro rata basis would not be difficult, and that once incentive per diem funds are kept in segregated accounts by the creditor railroads, any problems regarding refund of partially spent funds could be resolved.

The replies in opposition to refunding incentive per diem payment to the debtor railroads were filed by the creditor railroads, the Department of Transportation, the Bureau of Enforcement, and the National Industrial Traffic League, wherein they contend that refunding the said payments is not supported by judicial precedent; that incentive per diem funds are not trust funds but

are instead the property of the creditor car-owning railroads received in compensation for the use of their cars; that the debtor railroads have made no effective rebuttal to the Administrative Law Judge's statement that the debtor railroads would be unwilling or unable to meet anything near the standards of boxcar acquisition which is required of the creditor railroads; that debtor railroads, anticipating a return of incentive per diem funds would have less incentive to utilize the equipment on their lines efficiently to minimize incentive per diem payments; and that as correctly stated by the Administrative Law Judge, refunding incentive per diem payments to debtor railroads from whom the money has been collected would present difficult administrative problems, such as, for example, in the case of road A, which may be a net credit incentive road but is a debit road as to road B, any refunding by road A or a creditor would leave unsettled and unaccounted for its relationship with road B to which it is a debit road.

Conclusions.—Regular per diem funds represent compensation to the car owner for the use of the freight car, but the purposes of the incentive per diem program are to encourage the acquisition of cars found in short supply and to assure maximum utilization of the nationwide boxcar fleet by assuring expeditious release of the car by the terminating or delivering railroads. In a sense, incentive per diem funds are in the nature of a trust fund since they are required to be earmarked and kept separate from the carrier's general accounts. However, noted in issue 3, pursuant to statute, incentive per diem is actually "just and reasonable compensation to freight car owners".

In any event, the evidence adduced by the debtor roads is not strong enough in our opinion, to support refunding unspent incentive per diem funds to the debtor railroads from whom they were collected in the light of two main considerations: there are the foreseeable problems regarding the administrative mechanics of such an administrative return even if a standard of acquisitions

from general funds could be formulated and, more importantly, the potential refunding of unspent amounts to the debtor railroads would reduce their incentive to release cars expeditiously and, thereby, undermine the purpose of the incentive per diem program. Moreover, we will now permit the voluntary surrender of unspent incentive per diem funds to Rail Box which reduces the chance that these funds cannot and will not be put to their intended use. Accordingly, we agree with the conclusion of the Administrative Law Judge that incentive per diem funds which are unspent by the creditor railroads should not be refunded to the debtor railroads from whom they have been collected.

Issue number 5.—This issue is whether there are:

> Other methods to facilitate the use of accrued per diem funds for the purchase, building, or rebuilding of general service unequipped boxcars.

This issue concerns part 1036.4 of title 49 of the regulations, which provides, among other things, the following:

> The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with § 1036.3, may be drawn down in whole or in part at any time by the carrier to build or purchase, in whole or in part, new, unequipped boxcars for general service described in § 1036.1: Provided the carrier has in the same calendar year built or purchased its 1964-68 average acquisitions of such boxcars. Similarly, earmarked funds may be used in whole or in part to rebuild any number or portion or general service unequipped boxcars described in § 1036.1: *Provided,* The carrier has in the same calendar year rebuilt its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect * * *. As used in this section, "build," "rebuild," or "purchased" refer to a commitment to build, rebuild, or purchase which

results in the acquisition of a car on line ready for use within 10 months from the date of commitment, except that in extraordinary cases beyond the control of the carrier of the car supplier, a car that is delivered after 10 months from the date of the commitment may qualify if approved by the Bureau of Accounts of this Commission.

Various other methods were proposed by the parties to facilitate the use of accrued incentive per diem funds, in addition to those set out in the above regulations. For example, one suggestion was that incentive per diem funds be used for substantial repair (in excess of $1,500 a year) of boxcars which do not meet the 50 percent requirement. For a car to be considered rebuilt, its "cost of rebuilding, exclusive of the expense of dismantling and of all parts reused, must exceed 50 percent of the cost of new units of the same kind and cars at the time of rebuilding" (see 343 I.C.C. 49, 58). The Administrative Law Judge rejected this proposal for the same reason that it was previously rejected by the Commission at 343 I.C.C. 49. It was rejected because such use of incentive per diem funds might include maintenance which is not a valid purpose for spending the funds as it does not increase the boxcar fleet.

The Administrative Law Judge, however, found merit in the proposal that the railroads be allowed to apply incentive per diem funds for long-term leases of boxcars even if they do not result in the acquisition by the carrier of equity in the leased equipment. This would carry one step further the decision in 343 I.C.C. 49 which allowed the application of incentive per diem funds for leased equipment, so long as the lease was the equivalent of a purchase. Accordingly, the Administrative Law Judge provided in his changes to the regulations that net credit balances could be spent on leasing equipment without acquiring an equity interest, if a separate test period average for such leases was met out of general funds. Thus, the carriers must match their average acquisition by long-term lease during the

1964-68 period from general corporate funds before incentive per diem funds can be expended. Once these prerequisites are met, the leasors can use their incentive per diem funds for lease payments during the entire term of the lease.

Finally, the Administrative Law Judge considered the proposal to use incentive per diem funds to build a nucleus of a national pool of free running cars. Under this proposal, incentive funds would be transferred to a nonprofit organization for the procurement and maintenance of a national fleet of boxcars. The proposal would eliminate ownership of boxcars by individual carriers and thus remove the foreign versus homecar problem which has been inhibiting, to some extent, the expansion of the boxcar fleet. It would also reduce the amount of incentive per diem funds that are now being paid out in income taxes, thereby increasing the funds that would be available for the purchase of boxcars. On the whole, however, the Administrative Law Judge concluded that the proposal offered no immediate relief since it was still in the planning stage.

On exceptions, the Penn Central proposes to earmark its own net debit incentive per diem funds and then spend those funds for the acquisition or repair of equipment under the direction of the Commission. As an alternative, in response to the modification allowing the expenditure of incentive funds on nonequity leases, the Penn Central proposes that it be allowed to deduct present and future car rentals from total net incentive per diem payments.

The Soo Line does not object to the use of incentive funds for long-term nonequity leases. It requests, however, some restraint be placed on the use of incentive per diem funds for car maintenance because many nonequity leases contain monthly or annual charges covering both rental and maintenance costs.

The exceptions also take issue with the Administrative Law Judge's refusal to permit use of incentive per diem funds in con-

nection with a free running fleet of boxcars on his stated ground that the plan to provide and administer such a fleet had not materialized. The parties point out that the Administrative Law Judge's reasons for dismissal of this proposal because are no longer valid: Rail Box, the popular name for the national freight car pool company, has been approved by the Commission and is now operating. There is disagreement in the exceptions, however, on how to use the Rail Box concept. One suggestion is to make Rail Box the recipient of unspent incentive credit balances. A differing proposal is to have creditor carrier use incentive per diem funds for the acquisition of cars to be leased to Rail Box or otherwise made available to it on a basis of retention of ownership of the cars by the carrier without restricting their free running characteristic.

Finally, the Union Pacific excepts to what it considers to be the vagueness of the wording of the proposed section 1036.4 regarding the test period average for leased cars. It alleges that this section lumps together cars built or purchased with cars leased and does not accurately treat nonequity leases as a separate category.

Conclusion.—We agree with the Administrative Law Judge that the purpose of the incentive per diem program would be furthered by permitting incentive per diem funds to be used for long-term leases which do not result in any equity interest to the lessee. As he pointed out, such a modification would provide the railroad lessee with cash savings (at least in the short run) on overall payments since it could secure a lower interest rate. For instance, a conditional sales agreement would have an effective rate of 9.5 percent while a net finance long-term lease could be obtained for an effective interest rate of only 5.25 percent. Thus, he estimated that a railroad lessor would save $9 million over the term of a 14-year net finance lease on $30 million worth of boxcars. The savings in interest rates would, of course, provide additional funds for expanding

the Nation's boxcar fleet. Of course, the preferred method of purchase would be through the equipment trust device where the railroad retains equity interest and can use the tax advantages which would accrue. We recognize, however, that where an unprofitable railroad is involved the nonequity lease might be preferable. The nonequity lease would involve no down payment and the lessee, who retains the tax advantages, presumably passes a part of that onto the railroad in the form of a lower rate. The amendment which we hereinafter prescribe in this respect will provide that nonequity long-term leases not including the cost of maintenance as suggested by the Soo Line, and will require a separate test period average for cars acquired by nonequity leases, as suggested by Union Pacific. In addition, the amendment will provide that nonequity leases must be long-term leases of at least 10 years in duration.

The Penn Central's proposal to spend its net debit incentive funds for the acquisition or repair of equipment and/or to deduct present or future rentals from incentive payments is without merit. As the Administrative Law Judge properly stated:

> The expenditure of incentive per diem funds for repairs and maintenance of carrier lines would be outside the purposes of the IPD program and contrary to the intent of Congress when it amended section 1(14)(a). p. 18.

Furthermore, the spending of net debit funds for the acquisition of boxcars while deducting present and future annual rentals from incentive per diem payments is deficient for two reasons: There is no matching requirement and there is no compensation to the boxcar owners as mandated by section 1(14)(a).

Finally, as the parties point out on exceptions, since the Administrative Law Judge rendered his initial decision, the Commission, Division 3, approved on August 1, 1974, the Rail Box concept in Finance Docket No. 27589, ***American Rail Box***

Car Co.—Pooling, 347 I.C.C. 862. Therefore, the basis for his conclusions that Rail Box "offers no immediate relief" because it had not materialized, is no longer valid. Consequently, as discussed in issue number 3, unspent incentive per diem funds may be voluntarily turned over to Rail Box, for its administration and use. Our hereinafter prescribed amendment will include a provision to this effect.

Issue number 6.—This issue is:

> Whether any group of carriers should be exempt from the payment of incentive per diem.

The relevant portion of section 1(14)(a), which bears on this issue is as follows:

> The Commission * * * may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

No group of carriers is currently exempt from the payment of incentive per diem. In his initial decision, the Administrative Law Judge discussed the arguments made in support of exempting from the payment of incentive per diem, certain railroads, namely, terminating, bridge, bankrupt, and marginal railroads. He concluded that the terminating railroads request for exemption had no merit, on the basis that the Commission considered and rejected their arguments in a prior report in this proceeding, 337 I.C.C. 217, 232, wherein it was stated that:

> * * * It would not be in the national interest to exempt a group of carriers merely because they terminate a substantially greater number of carloads than they originate, or because they already own a sufficient number of cars to satisfy their own needs.

He also concluded that the arguments of the bridge carriers had no merit based on that same report wherein the Commission

stated that bridge carriers share in the division of revenue and thus should bear part of the expense of, and investment in, freight cars. Furthermore, he concluded that the position of the bankrupt and marginal railroads had no merit because they sought, in effect, to require the car-owning railroads to subsidize them. Finally, exempting these latter railroads would put added pressure on nonbankrupt debit lines, and granting bankrupt and marginal railroads an exemption might cause them to be discriminated against by nonexempt lines. Therefore, he concluded that the exemption of any group of carriers from the payment of incentive per diem was not warranted.

On exceptions, the carriers seeking exemptions contend that the legislative history of the incentive per diem provisions shows that it was the intent of Congress that the terminating northeastern railroads should be relieved from the burdens of incentive per diem, and, in support, quote Senator Cotton's comments to the effect that:

> The Senate committee amendment to the bill enumerated four categories of circumstances which the Interstate Commerce Commission had to take into consideration in determining and applying any incentive element to the compensation to be paid for the use of freight cars. The four specific factors were: First, carriers determined by the Commission as owing an adequate number of freight cars to meet their responsibilities to the needs of Commerce and the national defense; second, carriers which terminate a substantially higher percentage of interline traffic than they originate; third, types of freight cars the supply of which the Commission finds to be adequate; and fourth, such other cases or circumstances as the Commission finds to be in the public interest. (Cong. Rec. 10250-10251 daily ed, May 17, 1966.)

Exceptants also contend that the northeastern railroads terminate more cars than they originate and fall within the implied

intention of Congress to exempt such carriers from making incentive per diem payments; that alternatively, instead of making incentive per diem payments, the northeastern and other railroads should be permitted to apply those funds for the acquisition of general purpose boxcars; that bankrupt carriers should be exempt because of the changed conditions of increased number of bankruptcies of northeastern carriers since the Commission's prior report and order herein in 1970; that the so-called exemption provision of section 1(14)(a), set forth above, allegedly permits the Commission to exempt carriers which cannot afford the burdens of incentive per diem and still continue to provide adequate service to the public; that failure to exempt any of the indicated types of carriers from paying incentive per diem has not improved car utilization; that overall the funds could be better spent by the debtor carriers in special situations, since allegedly over one-fourth of the incentive per diem funds must be paid out in taxes by the creditor railroads and cannot be used for new car purchases; and that the creditor railroads which own cars have been transferring certain special equipment for transporting groceries and food products, designated as "XL" cars, to the standard boxcar designation of "XM" cars in order to collect additional incentive per diem and, consequently, force the debtor lines to make additional payments.

On exceptions and in reply to these exceptions, the creditor railroads support the conclusions of the Administrative Law Judge. They also point out that no group of carriers is entitled to an automatic exemption even if it is one of the four groups enumerated by Senator Cotton; that an exemption may be granted only if the Commission finds it to be in the public interest; that the Administrative Law Judge did in fact consider the so-called "changed conditions" since 1970 of the bankrupt Northeast railroads and he discussed them on page 23, of his initial decision as follows:

> We now come to the bankrupt and marginal railroads who seek exclusion because of their financial difficulties. These

> carriers are part of the national system of railroads and their obligation to provide the nation's shippers with reasonable service on request is not different from that of other companies. One of the opponents for exclusion stated: "Unless bankruptcy is to be considered as relieving a railroad of its public service responsibilities, it should afford no shelter for carriers failing to maintain car fleets adequate to handle their traffic and thereby generate revenues, helping to alleviate their financial ills."
>
> The circumstances of the financially needy roads cannot be attributed to the car owning railroads and it would be inequitable to require the car owning railroads to subsidize carriers who are in financial distress. Moreover, exempting these carriers from paying IPD would substantially increase the burden placed upon the remaining debit IPD lines * * *;

The creditor railroads further contend that the evidence shows improved utilization of cars without any exemptions; that the evidence does not support the allegation that carriers have reclassified cars as XM cars to bolster the plain boxcar fleet and to qualify for incentive per diem; that if the incentive per diem program is to be effective, the right of the owning carrier to a fair return on its property must be protected and its financial motivation must be maintained; that nonexempt lines would be hesitant to acquire cars which might spend considerable time on exempt carriers' tracks; that it would be cheaper for exempt carriers to use foreign cars than to buy their own cars; and that exempt carriers would have little incentive to improve car utilization, which would thus reduce the economic value of the equipment to an owning, nonexempt carrier.

Conclusion.—We agree with the Administrative Law Judge that the evidence does not warrant exempting any group of carriers from the payment of incentive per diem. Both section 1(14)(a) and its legislative history shows that our authority

to grant an exemption to any group of carriers is discretionary. The statute provides, as set forth above, that we "may exempt" any group of carriers in the national interest and Senator Cotton stated in the same speech referred to above, that the Commission's authority in this regard would be discretionary, as follows:

> Senator Cotton: In the bill before us today, as it has come back from the House of Representatives, the four types of circumstances spelled out in the Senate Bill are not directly listed. It is clear, however, that all the factors listed in the Senate bill still have to be considered by the Interstate Commerce Commission, and the Commission would have the power, and the duty, not to apply the incentive element to any group of carriers, and even a single carrier, where those four circumstances, or any other circumstances made it in the public interest to do so.
>
> In this connection I was pleased to note that the Chairman of the House Committee on Interstate and Foreign Commerce, MR. STAGGERS, in his statement to the House last week declared that—
>
> The bill in its present form provides that the Commission would be empowered *in its discretion* to exempt from the incentive element provisions *any group* of carriers where the Commission finds such exemption to be in the national interest. This provision enables the Commission to make exemptions from paying an incentive element by class of carrier, and permits the Commission to *consider* the several factors specifically authorized in the Senate bill. Cong. Rec. 10250-10251 (daily ed., May 17, 1966). [Emphasis supplied.]

The discretionary power of the Commission has been upheld in the courts. In *Florida East Coast R. Co. v. United States*, 368 F. Supp. 1009, 1020 (M.D. Fla. 1963), affirmed *per*

curiam 417 U.S. 901, the court stated: "(T)he Commission has controlled discretion to grant an exemption from incentive per diem charges only when it is found in the national interest to do so."

For the reasons enumerated by the Administrative Law Judge, the carriers seeking exemptions have failed to justify exercise of our discretionary authority to exempt them in the national interest from payment of incentive per diem. In addition, as the creditor carriers point out, on exceptions, the inevitable effects of granting an exemption to a group of carriers would be detrimental to the non-exempt carriers and to the total incentive per diem program. Furthermore, as seen above, the Administrative Law Judge did consider the "changed conditions," claimed by the bankrupt railroads, in reaching his conclusions.

Moreover, the evidence rebuts the allegation by the carriers seeking exemption that there has not been improved utilization. To cite one example, the president of the Boston & Maine Corporation stated: "We reduced our per diem net debit by some 9 percent, which would include the incentive, * * * partly because we concentrated on sending cars home more promptly." (tr. 451-452). Also, the contention by these same carriers regarding reclassification, has not been proved because there was no showing of how many cars were reclassified to the XM classification before incentive per diem became effective as compared with the number of cars reclassified after it became effective. Finally, the allegations that bankrupt carriers should be permitted to buy cars with incentive funds instead of paying these monies to car-owning railroads, because it would, among other things, reduce taxes and make the savings available for purchase of additional cars is without merit, since it would deprive car-owning roads of compensation. In addition, as noted by the Administrative Law Judge, is the fact that "payments of IPD by debtor railroads are tax deductible and thus serve to

reduce the taxes of many debtor railroads which are in a tax paying position".

Therefore, no amendment to the regulations will be prescribed in connection with this issue.

Ultimate Findings

In summary, we find no merit to the exceptions in connection with issues 1, 4, and 6 and since in each instance the Administrative Law Judge proposed no modification, no amendment to the regulations is warranted. In connection with issues, 2, 3, and 5 we find that amendments to the regulations should be prescribed. The amended regulations are set forth in Appendix B.

An appropriate order will be entered.

Commissioners Tuggle and Corber did not participate.

APPENDIX A

On pages 3-4 of the initial decision, the Administrative Law Judge stated:

In its prior report of April 28, 1970, 337 I.C.C. 217, the Commission prescribed incentive per diem (hereinafter called IPD) charges for the use of unequipped, general service boxcars (hereinafter called simply boxcars) and certain rules applying in connection therewith, with the objective of increasing the available number of such cars and improving the utilization of the entire boxcar fleet. The charges, at that time, were made to apply during the 6-months from September of each year through February of the following year. To assure that the funds will not be deposited in general funds and be expended for other purposes, the net incentive balances, that is, the excess of such charges received over those paid, after income taxes, are required to be earmarked solely for the purchase, building, or rebuilding of boxcars. They may only be used after each carrier has equaled its normal annual acquisition of such cars, which is measured by the average number purchased, built or rebuilt during the 5-year period 1964-68, inclusive.

On June 25, 1971, the Commission in 339 I.C.C. 627 issued a report on reconsideration wherein it modified its prior report solely in regard to the manner of participation by Canadian railroads.

In a report on further consideration, decided February 13, 1973, 343 I.C.C. 49, the Commission clarified, interpreted, and modified the rules and regulations governing IPD charges promulgated in 337 I.C.C. 217.

By order of March 30, 1973, the Commission, again amended its outstanding order relating to IPD by making IPD charges applicable throughout the entire year rather than the 6-month period prescribed earlier. This action was taken after it was noted that the nation was facing the most severe shortage of boxcars in the history of the Commission, which shortage was precipitated by the Russian wheat sale and other factors, and that there was at that time and would be for an indefinite period, a continuing shortage of boxcars for loadings. It believed that the extension of IPD charges on a continuing basis for an indefinite period was required to improve the utilization and distribution of boxcars during the period not included at that time in the application of the rule and in which car shortages were also occurring.

APPENDIX B

§ 1036.3 Earmarking

Each common carrier by railroad shall segregate in Account 716, Capital and Other Reserve Funds, and shall transfer from

Account 798, Retain Income, Unappropriated to Account 797, Retained Income, Appropriated, an amount equal to the net credit balance resulting from any incentive per diem settlement involving boxcars subject to this part. The carrier shall maintain a separate bank account for the segregated funds. Canadian carriers shall transfer a net balance after taxes to a U.S. designee, which may be either a United States class I railroad or a United States corporation established solely to purchase, hold title to, and control general service, unequipped boxcars subject to the Department of Transportation's safety regulations and the Interstate Commerce Commission's rules pertaining to per diem and car service, and to any reporting requirements determined to be applicable by the Commission's Bureau of Accounts. If the designee of Canadian carriers is a United States railroad, it shall maintain a separate account for funds received on Canadian-owned boxcars. All boxcars purchased or built by such designee or such other corporation with incentive per diem funds earned on Canadian boxcars must be built in the United States. Any United States taxes incurred after transfer of a net balance to such designee may be deducted from the transferred amount for the purpose of determining a final net balance for investment. The earmarked funds shall be reduced by the amount of the additional income tax paid as the result of increasing taxable income by inclusion of net incentive per diem earnings. The funds in such account shall be used to purchase, lease, or build new, unequipped boxcars for general service or rebuild general service, unequipped boxcars with code numbers and mechanical designations set forth in § 1036.1 for addition to such carrier's or designee's fleet in accordance with this part. The unexpended funds remaining in the accounts of the carriers may be invested in Government bonds or other interest-bearing, temporary securities. The interest earned thereafter shall become part of the earmarked fund.

§ 1036.4 Use of Funds

The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with § 1036.3, may be drawn down in whole or in part at any time by the carrier to build, lease equivalent of purchase, or purchase, in whole or in part, new unequipped boxcars for general service described in § 1036.1, *provided*, the carrier has in the same calendar year built, lease, or purchased its 1964-68 average acquisitions of such boxcars and made up an arrearage in having failed to maintain such average each year this order is in effect. Earmarked funds may also be used in whole or in part to lease any number of new unequipped boxcars for general service described in § 1036.1, in which the carrier is not acquiring an equity interest, *provided*, the carrier has in the same calendar year leased its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year the order is in effect. Nonequity leases must be at least 10 years in duration, and, in connection with such leases, earmarked funds must not be used for the cost of maintenance. Earmarked funds may be used in whole or in part to rebuild any number or portion of general service, unequipped boxcars described in § 1036.1, *provided*, the carrier has in the same calendar year rebuilt its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year the order is in effect. Net balances on Canadian-owned cars may be drawn down without regard to prior acquisitions, but where the designee is a class I United States carrier such drawdowns shall not affect that carrier's accumulation of arrearages resulting from prior failure to build, rebuild, lease, or purchase its 1964-68 arrearages. However, upon application, including a showing that all parties to the proceeding herein have been notified by the carrier of such application and a showing of good cause why any carrier is unable to draw down in whole or in part the net credit balance resulting from incentive per diem settlements because it cannot comply with the above test period

average requirements of having in the same calendar year built, rebuilt, leased, or purchased its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect, the Commission may, in its discretion, after consideration of all views regarding the application, modify the test period average to the extent consistent with the public interest and the national transportation policy. Such modification, as a minimum, shall require that a carrier match the earmarked funds it will use with an equal amount of its own funds. Earmarked funds must be put to use within 18 months after the end of the calendar year in which the funds are collected and result in a net credit balance for the building, rebuilding, leasing, or purchasing of general service, unequipped boxcars described in § 1036.1 for addition to such carrier's or designee's fleet in accordance with this part. Upon a showing of good cause an application, including a showing that the parties to the proceeding herein have been notified by the carrier of such application, may be made to the Commission for waiver of the said 18-month period, which may, in the Commission's discretion, be granted after consideration of all views regarding the application. If the earmarked funds are not used within the 18-month period, they may be voluntarily surrendered to Rail Box whose establishment and operation was approved in Finance Docket No. 27589, *American Rail Box Car Company and Trailer Train Company, et al.—For Approval of the Pooling of Car Service with Respect to Box Cars*. If the carrier fails within the stated period to put to use collected earmarked funds which result in a net credit balance, has not obtained relief from that requirement, and has not surrendered such funds to Rail Box, the Commission will investigate the matter to determine what, if any, corrective action is warranted. Appropriate corrective action would include section 16(12) remedies among others. Carriers may make temporary investments of unexpended funds in Government bonds or other liquid securities. Such securities must be readily convertible to cash so that funds remain available for boxcar purchases. Interest

earned must become part of the earmarked fund. As used in this section, "build," "rebuild," "lease," or "purchase" refer to a commitment to build, rebuild, lease, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment, except that in extraordinary cases beyond the control of the carrier or the car supplier, a car that is delivered after 10 months from the date of commitment may qualify if approved by the Bureau of Accounts of this Commission.

Title 49—TRANSPORTATION

Chapter X—INTERSTATE COMMERCE COMMISSION

Subchapter A—GENERAL RULES AND REGULATIONS

Part 1036—INCENTIVE PER DIEM CHARGES ON BOXCARS

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 31st day of March 1975

Ex Parte No. 252 (Sub-No. 1)

INCENTIVE PER DIEM CHARGES—1968

Upon consideration of the record in the above-captioned proceeding, including (1) the reports and orders of the Commission, 337 I.C.C. 183, 337 I.C.C. 217, 339 I.C.C. 627, and 343 I.C.C. 49; (2) various petitions for reconsideration, for reopening, for modification, for suspension or recision of the outstanding orders, replies, and statements of position supporting or op-

posing these petitions; (3) the Commission's order of April 24, 1973, reopening this proceeding for reconsideration of certain issues raised by these pleadings which are set forth in our report on exceptions herein of this date; (4) the responses thereto filed by numerous parties on various dates, the oral hearing, and the initial decision of the Administrative Law Judge served July 23, 1974; and (5) the exceptions and replies to the initial decision filed by numerous parties on various dates; and

It appearing, That the Administrative Law Judge in his initial decision recommended certain changes in sections 1036.3 and 1036.4 of Subchapter A, Chapter X, Title 49 of the Code of Federal Regulations; and that, in the light of the exceptions and replies, some of his recommended changes should be prescribed, some recommended changes should not be prescribed, and certain additional changes in the same regulations should be prescribed; wherefore:

It is ordered, That sections 1036.3 and 1036.4 of Subchapter A, Chapter X, Title 49 of the Code of Federal Regulations, be, and they are hereby, amended to read as set forth in appendix B of our report on exceptions herein.

It is further ordered, That, as described in the report on exceptions herein, the motion to strike of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be, and it is hereby, granted; and the request to strike of the Chicago, Rock Island and Pacific Railroad Company be, and it is hereby, denied.

It is further ordered, That a copy of this order shall be delivered to the Director, Office of the Federal Register, for publication therein.

And it is further ordered, That this order shall become effective 35 days from the date of service and continue in full force and effect until the further order of the Commission.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

By the Commission.

ROBERT L. OSWALD
Secretary

(Seal)